Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VERGNAUD AIMABLE, *et al.*,
Petitioners,
v.
LONG & SCOTT FARMS, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Courts of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

TIMOTHY B. DYK
(*Counsel of Record*)
DANIEL D. McMILLAN
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

GREGORY S. SCHELL
ROBERT A. WILLIAMS
FLORIDA RURAL LEGAL
SERVICES, INC.
406 S.E. Avenue E
Suite 102
Belle Glade, Florida 33430
(407) 996-5266

Counsel for Petitioners

67 pp

QUESTIONS PRESENTED

Under this Court's decisions an employment relationship under the Fair Labor Standards Act ("FLSA") and the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA") exists if, in light of the totality of the circumstances, the worker is economically dependent on the entity for whom the work is performed. This Court has also recognized that an employee may be jointly employed by two or more employers, a situation that is common in agriculture. This case presents the following questions:

1. Whether the Court of Appeals erred in holding that a fundamentally different test for economic dependency applies in a joint-employer situation as compared to a single employer situation?

2. Whether the Court of Appeals erred in holding that, in a joint employer situation, it is irrelevant that the putative joint employer indirectly controls and supervises the work unless the common law test for employment is satisfied?

3. Whether the Court of Appeals erred in holding irrelevant for purposes of determining joint employment such traditional factors as investment in equipment and facilities, opportunity for profit and loss, permanency and exclusivity of employment, and the degree of skill required to perform the job?

4. Whether the Court of Appeals erred by concluding that two important factors -- ownership of the facilities where the work occurred and performance of a specialty job integral to the business -- are to be accorded "little relative weight" in the joint employment context?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the court below were the petitioners, Vergnaud Aimable, Alain Alcin, by and through his wife, Gerta Alcin, Gerta Alcin, Orasis Alcindor, Joseph Miguel Alcius, Jean Duson Aldreus, Alisma Altidor, Joseph Jerome Altidor, Allphonse Amilcar, Icienner Amilcar, Jean Claude Amilcar, Rose Marie Emie Anderson, Dieulila Andre, Marie Andre, Joaquin Antoine, Gabriel Artis, Joacius Auguste, Pierre Paul Augustin, Adele Avertis, Vicsamar Odimar Baptiste, Joseph Lamartine Beauvais, Gerard Belizaire, Jocelyne Bertin, Cedieu Blanc, Delva Blanc, Elisnord Blanc, Clairvenante Boulin, Denuna Boulin, Joe Louis Bridges, Lerone Buissereth, Charles Cadet, Cereste Cajuste, Jean Obnes Casimir, Jean Pierre Castil, Dumond Catul, Excelia Catul, Jerome Celestin, Marie Odmise Cesaire, Augustin Cesar, Tony Chapman, Dieuseul Charlemon, Pierre Charles, Rosette Charles, Sauveur Charles, Yvette Charles, Duversin Clairin, Fednel Clairant, Clervoyant Clenor, Presendieu Clenor, Verrilien Clerve, Marie Edite Clesidor, Tepcy Codio, Odilon Coupette, Patrick Dalge, Archange Darius, Jean Deas, Denis Decoste, Antoine Delva, Eliana Delva, Elmise Delva, Michel Demezin, Leclerc Deneus, Desio Deristin, Quisit Deshommes, Derilus Desir, Mepricia Desir, Tine Desius, Souvenance Desrosier, Joseph Andre Dessame, John Destin, Pierre Jerome Devariste, Paulette Devil, Cinetude D'Haiti, Claudette Dor, Innocent Dorcelly, Prudancia Dorcinvil, Joseph Gerard Dorlus, Germante Duvermon, Cinelia Edouard, Jacques Edouard, Delano Elisme, Frank Elizee, Lifaite Eloi, Saintervil Emilca, Donald Ernest, Vital Estefil, Louisdor Estinfil, Solange Estinfort, Dumarsaie Etienne, Wilfride Jean Eugene, Dieuseul Exantus, Joseph Exantus, Andre Sauvene Fatal, Noelcius Fenelus, Anne Marie Fils-Aime, Norvilus Fleurant, Joseph Fleurjust, Jean Lifrand Fondrose, Michael Ford, Marie Augusta Fortune, Ron Foster, Jean Sony Francois, Omilier Francois, Polinis Francois, Alize Clergemort Fritz, Sainte Rose Galiere, Paul Garcon, Murdieu Georges, Nelie Georges, Charlonet Gue, Veronique Guerrier, Freddie Halloway, Cebien Hamilear, James Edward Hanna, Ronnie Harper, Enel Henri, Annette Hopkins, Patsy Lee

Hopkins, Jimmy Lee Howard, Maxi Innocent, Philomene Isnar, Larry B. Ivory, by and through his wife, Mamie Ivory, Leroy Jackson, Jean Baptiste Jacques, Raymond Jean, Yolene Jean, Jean Paul Jean-Baptiste, Jean Pierre Jean-Baptiste, Lumenes Jean-Baptiste, Marcilien Jean-Baptiste, Saint Jean Jean-Baptiste, Charite Jean-Charles, Ismoque Jean-Louis, Marie Elene Jean-Louis, Prefet Jean-Louis, Marie Yolande Jean-Pierre, Francois Jeoboam, Celesson Jeune, Elia Johnson, Jean Moineau Joinvil, Rene Jolteus, Brenda Louise Jones, Andre Joseph, Elisabeth Joseph, Emmanuel Joseph, Francois Joseph, Julien Joseph, Kenel Joseph, Lorista Joseph, Mariciane Joseph, Paul H. Josinvil, Jean D. Juleau, Dieumarc Jules, Sylvina Juste, Jerry Lee King, Elize Labonte, Michel Laguerre, Vercilien Lamy, Christine Laurent, Audinor Laurette, Antoine Legros, Titus Ligene, Jean Baptiste Limorze, Mesius Logiste, Jean Hevil Loiseau, Carilia Lorius, Fene Louis, Francis Louis, Joseph Andreville Louis, Luckner Louis, Marie Louis, Vital Louis, Saint Pierre Lucce, Jerome Lusca, Naitil Marcelin, Jean Marius, Marie Rosana Massillon, Anouse Maxime, Vincent McBride, Marie Jyolette Meide, William Merove, Gelin Metayer, Patrick Metellus, Jean Alix Michaud, Althazar Michel, Curla Michel, Lifaite Michel, Prosper Michel, Silon Michel, Walter Michel, Rosemonde Milien, Marie Rose Mimi, Excellent Moise, Marie Anoinette Moise, Pierre Paul Mondesir, Odette Monerant, Stan Montgomery, Samuel Augustus Mowatt, Delivois Murat, Gladys Nelson, Sylvester Newsome, Arsene Nicolas, Joseph Charitable Nicolas, Joseph Lafortune Nicolas, Bazil Noel, Dieugrand Noel, Gabriel Noel, Paraces Noel-Jeune, Joseph Arnold Nonombre, Osette Omilus, Celia Pasteur, Wanel Paul, Audin Petit-Bois, Clorisma Petit-homme, Felix Petit-homme, Joseph Archange Petit-homme, Joseph Immano Petit-homme, Marie Valcemir Petit-homme, Tonton Petit-homme, Louicilien Petit-Louis, William D. Phebus, Bernadette Phicien, Carleau Pierre, Elver Pierre, Maurilus Pierre, Idana Pierre-Louis, Fitho Plantin, Marie Rose Plantin, Yvon Poucely, Tyrone Powell, Lubert Raymond, Talius Richardson, Jules Richemond, Jean Gislait Romilus, Francois Romulus, Myrtil Sagesse, Yves Saintil, Blanc Seide, Louis Seide, Camelus Severin, Jean Silverain, Rene Simeon, Gabriel St. Eloi, Milfranc

St. Fleur, Sam St. Fleurant, Andre St. Jean, Kislene St. Hubert, Marcorel St. Hubert, Lucien St. Lot, Magre St. Pierre, Petienne St. Pierre, Phito St. Pierre, Ferdinand Telemaque, St. Jean Telemaque, Clothaire Thelemaque, Marc Thelemaque, Onondieu Thelemaque, Charles Thermidor, Celina Thomas, Archibald Wilford Thompson, Charles Jean Thony, Lucnel Timoleon, Ray Tin, Phanor Toussaint, Remilus Toussaint, Timothy Tucker, Yolette Ulysse, Cilitane Valcourt, Dorvilus Vil, Fanest Vilsaint, Joseph Vincent, Billy Watson, Freddie Lee Watts, William Jerome Willingham, Willie Ray Wilson, Tommy Lee Young, and the respondent, Long & Scott Farms, Inc. (owned by William D. Long and Frank D. Scott, Jr.).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT 4

1. Background 5

2. Proceedings Below 8

REASONS FOR GRANTING THE WRIT 10

I. IN APPLYING A FUNDAMENTALLY DIFFERENT EMPLOYMENT TEST IN A JOINT EMPLOYER SITUATION VERSUS A SINGLE-EMPLOYER SITUATION THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS. 12

II. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS BY HOLDING THAT INDIRECT CONTROL AND SUPERVISION ARE IRRELEVANT IN A JOINT EMPLOYMENT CONTEXT. 16

TABLE OF CONTENTS

Page

III. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS IN REJECTING FOUR TRADITIONAL FACTORS PROBATIVE OF ECONOMIC DEPENDENCE AND ACCORDING OTHERS "LITTLE RELATIVE WEIGHT." 21

A. The Eleventh Circuit's Rejection Of Four Relevant Factors Creates A Substantial And Irreconcilable Conflict. 21

B. The Decision Below Conflicts With Decisions Of This Court And Other Courts Of Appeal By According "Little Relative Weight" In The Joint Employment Context To Ownership Of The Premises And Performance Of Work Integral To The Business. . . 24

IV. THIS CASE PRESENTS IMPORTANT AND RECURRENT ISSUES OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT. 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page

Cases

Antunez v. G&C Farms, 126 Lab. Cas. (CCH) ¶ 33,015 (D.N.M. 1993) 12, 14, 15, 20, 22

Aviles v. Kunkle, 765 F. Supp. 358 (S.D. Tex. 1991), *vacated for lack of personal jurisdiction*, 987 F.2d 201 (5th Cir. 1992) 23

Bartels v. Birmingham, 332 U.S. 126 (1947) 11, 21

Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317 (5th Cir. 1985) 12, 19, 25

Boire v. Greyhound Corp., 376 U.S. 473 (1964) 14

Brock v. Superior Care, Inc., 840 F.2d 1054 (2d Cir. 1988) 19, 23

Castillo v. Givens, 704 F.2d 181 (5th Cir.), *cert. denied*, 464 U.S. 850 (1983) 12, 19, 20, 25

Cavazos v. Foster, 822 F. Supp. 438 (W.D. Mich. 1993) 19, 23

Dole v. Snell, 875 F.2d 802 (10th Cir. 1989) 23

Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984) . . 18, 23

Donovan v. Gillmor, 535 F. Supp. 154 (N.D. Ohio 1982), *appeal dismissed*, 708 F.2d 723 (6th Cir. 1982) 19

Donovan v. Sureway Cleaners, 656 F.2d 1368 (9th Cir. 1981) 23

Fahs v. Tree-Gold Co-op Growers, 166 F.2d 40 (5th Cir. 1948) 20, 22

Falk v. Brennan, 414 U.S. 190 (1973) 11, 12, 14

TABLE OF AUTHORITIES (Cont'd.)

Page

Goldberg v. Whitaker House Cooperative, Inc.,
366 U.S. 28 (1961) 11, 18

Haywood v. Barnes, 109 F.R.D. 568
(E.D.N.C. 1986) 12, 14, 15, 22, 24

Hodgson v. Griffin & Brand of McAllen, Inc.,
471 F.2d 235 (5th Cir.), *cert. denied*,
414 U.S. 819 (1973) . . . . *passim*

Hodgson v. Okada, 472 F.2d 965
(10th Cir. 1973) 11, 15, 19

Howard v. Malcolm, 852 F.2d 101
(4th Cir. 1988) 14, 15, 22

Leach v. Johnston, 812 F. Supp. 1198
(M.D. Fla. 1992) 14, 15, 19

Maldonado v. Lucca, 629 F. Supp. 483
(D.N.J. 1986) 13, 14, 15

Martin v. Selker Brothers, Inc., 949 F.2d 1286
(3d Cir. 1991) 23

Mednick v. Albert Enterprises, Inc.,
508 F.2d 297 (5th Cir. 1975) 10

Mendez v. Brady, 618 F. Supp. 579
(W.D. Mich. 1985) 20, 23

Monville v. Williams, 107 Lab. Cas. (CCH)
¶ 34,979 (D. Md. 1987) 12, 19

Nationwide Mutual Ins. Co. v. Darden,
112 S. Ct. 1344 (1992) 10, 18

TABLE OF AUTHORITIES (Cont'd.)

Page

Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748 (9th Cir. 1979) . . . . *passim*

Rutherford Food Corporation. v. McComb, 331 U.S. 722 (1947) . . . . *passim*

Secretary of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987), *cert. denied*, 488 U.S. 898 (1988) 12, 19, 23, 25

Thomas v. Brock, 617 F. Supp. 526 (E.D.N.C. 1985), *aff'd in relevant part*, 810 F.2d 448 (4th Cir. 1986) 23

Tobin v. Anthony-Williams Mfg. Co., 196 F.2d 547 (8th Cir. 1952) 19, 23

United States v. Rosenwasser, 323 U.S. 360 (1945) 10

United States v. Silk, 331 U.S. 704 (1947) . . . 10, 18, 21, 26

Usery v. Pilgrim Equipment Company, Inc., 527 F.2d 1308 (5th Cir.), *cert. denied*, 429 U.S. 826 (1976) 19, 23

Washington v. Miller, 721 F.2d 797 (11th Cir. 1983) 5

Wirtz v. Lone Star Steel Co., 405 F.2d 668 (5th Cir. 1968). 14, 15

Statutes and Regulations

28 U.S.C. § 1254(1)(1988) 2

29 U.S.C. § 202 (1988) 10

29 U.S.C. § 203 (1988) 2, 10

29 U.S.C. 206(a)(1988 & Supp. IV 1992) 9

29 U.S.C. § 211(1988 & Supp. IV 1992) 9

TABLE OF AUTHORITIES (Cont'd.)

Page

29 U.S.C. § 1802(1988) 3, 11

29 U.S.C. § 1821 (1988) 9

29 U.S.C. § 1822(a)(1988) 9

29 U.S.C. § 1831(c) (1988) 9

29 U.S.C. § 1832(a) (1988) 9

29 U.S.C. § 1841(b) (1988) 9

29 C.F.R. § 500.20 (h)(4)(1993) . . . . *passim*

29 C.F.R. § 791.2 (1993) 11, 15

Legislative History

128 Cong. Rec. 23,499 (1982) 27

128 Cong. Rec. 26,008 (1982) 27

H.R. Rep. No. 885, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 4547 . . . . *passim*

Miscellaneous

ABA Study of Federally Funded Legal Aid for Migrant Farmworkers (June 1993) 26

Report of the Comm'n on Agricultural Workers, (Nov. 1992) 26, 28

United States Dep't of Health & Human Services, *Atlas of State Profiles Which Estimate Number of Migrant and Seasonal Farmworkers and Members of Their Families* (1990) 25

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1a) is reported at 20 F.3d 434 (11th Cir. 1994). The opinion of the United States District Court for the Middle District of Florida is unreported (App. 20a).

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[1] The only corporation that is a party to this proceeding is Respondent Long & Scott Farms, Inc. Petitioners are unaware of any parent company or subsidiary of Respondent required to be listed pursuant to Supreme Court Rule 29.1.

JURISDICTION

The Court of Appeals entered its judgment on May 10, 1994. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)(1988).

STATUTES AND REGULATIONS INVOLVED

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, provides:

§ 203. Definitions

As used in this chapter--

* * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . .

(e)(1) Except as provided in paragraphs (2), (3), (4) the term "employee" means any individual employed by an employer.

* * * *

(g) "Employ" includes to suffer or permit to work.

29 U.S.C. § 203(d), (e), (g) (1988).

The Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. §§ 1801-1872, provides:

§ 1802. Definitions

As used in this chapter--

* * * *

(2) The term "agricultural employer" means any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.

* * * *

> (5) The term "employ" has the meaning given such term under section 3(g) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 203(g)) for purposes of implementing the requirements of that Act.

29 U.S.C. § 1802(2), (5) (1988).

The AWPA regulations, 29 C.F.R. §§ 500.0-500.271, provide:

> (i) The term *joint employment* means a condition in which a single individual stands in the relation of an employee to two or more persons at the same time. A determination of whether the employment is to be considered joint employment depends upon all the facts in the particular case. If the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee, a *joint employment* situation does not exist.
>
> (ii) Questions will often arise under the Act as to whether individuals employed by a farm labor contractor are also jointly employed by another person engaged in agriculture (including any person defined in the Act as an agricultural employer or an agricultural association). Such joint employment relationships are common in agriculture and have often been addressed by the Federal courts. See *Hodgson v. Okada*, 472 F.2d 965, *Hodgson v. Griffin and Brand*, 471 F.2d 235, *Mitchell v. Hertzke*, 234 F.2d 183, *United States v. Rosenwasser*, 323 U.S. 360, *Rutherford Food Corporation v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, and *Usery v. Pilgrim Equipment Company, Inc.*, 527 F.2d 1308. In determining whether such a joint employment relation exists the courts have cited the broad definition of *employ* in the Fair Labor Standards Act which *includes to suffer or permit to work*. The factors considered significant by the courts in these cases and to be used as guidance by the Secretary, include, but are not limited to, the following:

(A) The nature and degree of control of the workers;

(B) The degree of supervision, direct or indirect, of the work;

(C) The power to determine the pay rates or the methods of payment of the workers;

(D) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;

(E) Preparation of payroll and the payment of wages.

29 C.F.R. § 500.20(h)(4)(i)-(ii) (1993) (emphasis in original).

STATEMENT

This case presents important questions as to the standard for joint employment under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act. The facts are essentially undisputed.

Petitioners are 206 migrant and seasonal farm workers who, at various times between 1985 and 1989, harvested crops grown by Respondent Long & Scott, Inc. ("Long & Scott").[2] Most of the Petitioners have little formal education -- many never completed intermediate school and others never completed grade school.[3]

Respondent Long & Scott owns and operates an approximately 1,200 acre vegetable farm located in Florida. (RSF1: Scott dep. 12, 104.) Frank Scott ("Scott") owns 50% of Long & Scott's stock and controls all of the day-to-day operations of the farm. (RSF2: Scott Aff. ¶ 2.)

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[2] *See generally* RSF1: Petitioners' Responses to Interrogatory No. 3. The district court docket sheet indicates that documents submitted in connection with the parties' summary judgment motions and cited herein are included in the record in two unpaginated separate files. "Separate files" number one and number two are cited as RSF1 and RSF2, respectively.

[3] *See generally* RSF1: Petitioners' Responses to Interrogatory No. 15.

1. *Background*

Long & Scott hired defendant John Miller, Jr. ("Miller"), a farm labor contractor, to recruit and furnish migrant farm workers to harvest its most labor intensive crops -- corn, cabbage, and cucumbers. (*See, e.g.*, RSF2: Miller Aff. ¶ 3.) Miller recruited Petitioners as farm workers. Some of the workers recruited by Miller to work at Long & Scott's farm stayed at a labor camp operated by Miller. Miller also provided transportation to and from Long & Scott's fields for the few workers who did not have their own transportation. (*Id.* at 123, 225.) Miller has a seventh grade education. (*Id.* at 93.)

Miller and his crews have worked for Long & Scott for twenty-five years. (RSF1: Miller dep. 25.) Miller continued to be employed even though he had a long history of labor law violations. A prior opinion of the Eleventh Circuit, *Washington v. Miller*, 721 F.2d 797, 801 (11th Cir. 1983), addressed earlier violations of the FLSA and the Farm Labor Contractor Registration Act (the predecessor to the AWPA) by Miller with respect to farm workers on Long & Scott's farm. When Miller was jailed for labor law violations, Scott made available $20,000 to bail Miller out of jail. (RSF1: Miller dep. 301.)

Long & Scott used Miller and his crews exclusively to harvest its corn, cabbage and cucumber crops. (RSF1: Miller dep. 29, Scott dep. 28, 119-20.) During the harvest season in Florida, Petitioners and Miller worked for other farmers only when such work did not interfere with Long & Scott's harvest. For example, some of the Petitioners harvested corn or cucumbers for other farmers a few days a year when Long & Scott had no work but immediately returned to Long & Scott's farm whenever Long & Scott's harvest resumed. (RSF1: Miller dep. 67-68.) Long & Scott accounted for just under fifty percent of Miller's total annual revenue and was his single largest source of revenue. (RSF2: Miller Aff. ¶43.)

None of the harvesting tasks performed by Petitioners, though physically demanding, required any special skill or training. The harvesting activity performed by Petitioners involved pulling ears of corn, cutting cabbage or cucumbers, assembling boxes or crates, packing vegetables into the crates, and closing or stacking the crates.[4] For example, a crew of approximately sixty was needed to harvest the corn at Long & Scott's sand farm, using a "mule train" which was custom-built by Long & Scott for use on its farm. A mule train is a tractor with two wings extending across twenty-four rows. Corn was pulled off the stocks by twenty-four pullers and placed on a conveyor belt. The crew for the corn harvest also included (1) packers who packed the corn in boxes, (2) a checker who recorded the number of boxes filled by each packer, (3) workers who assembled boxes, (4) closers who closed the boxes, (5) workers who pushed empty boxes to the packers or full boxes down the conveyor belt, and (6) stackers who stacked the boxes on the truck. (RSF1: Miller dep. 56-67.)

The amount of work available to Petitioners was controlled by Long & Scott. Long & Scott unilaterally decided what crops to plant, when to plant, and which plots to plant first. (RSF1: Scott dep. 35, 93, 98, Miller dep. 128-29, 200.) Long & Scott checked on the crops on a regular basis and in consultation with Miller decided when to harvest and what specific blocks to harvest each day. (RSF1: Miller dep. 73-75, Scott dep. 35.) Miller daily received instructions from Scott regarding which blocks to pick and, whenever Miller picked a block of corn without Scott's approval, Miller was "ba[w]led out." (RSF1: Miller dep. 148-49.) Whenever Scott requested that a certain acre be harvested, that portion of the field was harvested even if Miller disagreed. (RSF1: Miller dep. 200.)

In addition to directing the harvest, Long & Scott exercised substantial control indirectly over Petitioners' other activities through Miller. Thus, for example, Scott supervised the grading of vegetables to make sure the job was done right, Scott notified Miller if a worker was not doing a good job or if too many undersized cucumbers were being picked, and Petitioners could not weed the cucumber fields unless Miller first consulted and received Scott's approval.[5]

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[4] RSF1: Miller dep. 185-86, 194-95, 229-33, Scott dep. 120-21.

Long & Scott also exercised some direct supervision over Petitioners. For example, Petitioner Tommy Lee Young stated that there was "a man from the company who came out to the fields every day and told us what to do, including what to cut and how to pack. He spoke to me personally on several occasions." (RSF1: P.M. Exh. 4 (Answer of Young to Interrogatory No. 16).) More than thirty other Petitioners submitted similar statements. (*See generally* RSF1: P.M. Exh. 4.)

Long & Scott compensated Miller on a piece-rate basis, and Miller, in turn, compensated virtually all of the Petitioners on a piece-rate basis. For instance, Long & Scott paid Miller a flat rate per crate of corn. (RSF1: Scott dep. 109.) Out of the $1.00 per crate of corn Miller received, he paid the pullers $0.20 per crate to be divided twenty-four ways and paid the other field workers varying piece rates depending upon the task. (RSF1: Miller dep. 107.)

The piece rates paid to Miller by Long & Scott were set at the beginning of each season and did not fluctuate with the market. (RSF1: Miller dep. 288-89.) Neither Miller nor the Petitioners bore any market risk; that risk was borne by Long & Scott. (*Id.*) While the market price for the produce harvested by Petitioners might fluctuate substantially during the course of the season, Miller and the Petitioners were paid regardless of changes in the price or the ability of Long & Scott to sell the produce. (RSF1: Scott dep. 62-63, 84-85, 114.) Likewise, except in rare instances, Petitioners and Miller were paid for their work notwithstanding problems with the crop (*e.g.*, rejection of corn by federal inspector due to worms). (*See, e.g.*, RSF1: Scott dep. 126-28.)

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[5] *See, e.g.*, RSF1: Scott dep. 79-81, Miller dep. 243-46; RSF2: Miller Aff. ¶ 31.

The rates paid to Petitioners were increased only when Long & Scott agreed to raise the rates paid to Miller. (RSF1: Miller dep. 106, 107, 191.) When Miller sought increases in his per unit rate of compensation, he justified the requests by mentioning to Scott the need to increase wages paid to the workers and the rising costs of providing housing to the workers. (RSF1: Scott dep. 118.)

Long & Scott owned all substantial equipment and facilities used in connection with the harvest activity performed by the migrant farm workers. The items furnished by Long & Scott included: (1) the mule train, which was custom built by Long & Scott and driven by its mechanic, Larry Petty; (2) the tractor and trailer used to haul boxes and crates to the fields; (3) the cucumber buckets and bins used by pickers; (4) the crates and boxes into which the vegetables were packed; (5) the pallets on which the grading crew stacked the crates and boxes; (6) the forklifts, all of the grading equipment and the three large flatbed trucks used to transport the crops from the field; and (7) the packing/grading shed and the pre-cooler.[6] Miller, on the other hand, supplied but a small number of hand tools used to harvest Long & Scott's crops.[7]

In addition to furnishing the equipment and machinery essential to the harvest, Long & Scott was responsible for maintenance and the cost of operation. (RSF1: Scott dep. 106, 145, Miller dep. 103-04.) Long & Scott also provided Miller with free office space located on its property near the grading shed from which he paid out wages to the farm workers. (RSF1: Miller dep. 135-36.)

2. *Proceedings Below*

When Petitioners were not paid minimum wages, they brought suit against Long & Scott and Miller alleging that they were both liable as joint employers for violations of the minimum wage and recordkeeping provisions of the FLSA and AWPA statutes.[8] Following cross-motions for summary judgment on the issue of joint employment, the District Court held that Miller was Petitioners' sole employer and that Long & Scott was not a joint employer. App. 24a. Contrary to forty-five years of Supreme Court precedent, the District Court held that "economic reality" is *not* the ultimate test for employment relationships under the FLSA because "the workers are always dependent on the farmer in an economic sense . . . ." App. 24a. Accordingly, the District Court considered only the common law tests for employment -- indicia of direct control and supervision -- and refused to consider the totality of the circumstances. The District Court concluded that only Miller and not Long & Scott was Petitioners' employer. App. 24a.

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[6] *See* RSF1: Scott dep. 74, 75-76, 86-88, 99-101, 120-21; Miller dep. 103-04, 185-86, 187, 196, 232, 286-87.

[7] RSF1: Scott dep. 120, 131, Miller dep. 256.

On appeal, the Eleventh Circuit treated the joint employment determination as a question of law and "analyze[d] *de novo* each of the eleven factors" at issue. App. 9a. Purporting to eschew "common law definitions," the Court of Appeals recognized that the "'economic reality' of all the circumstances" is indeed the basic test for joint employment (App. 7a), and acknowledged that "[f]acially, appellants [sic] argument is attractive . . . ." App. 18a. However, the Court proceeded to place emphasis on the direct and narrow aspects of control and supervision that guided the common law approach to employment. Affirming the District Court's ruling, the Court of Appeals held that the test to be applied in joint employer cases differs from that applied in single employer cases in two fundamental respects. *First*, the Eleventh Circuit held that four traditional factors probative of economic dependence and employment relationships "are of no value to joint employment determinations" (App. 18a) -- investment in equipment and facilities, the workers' opportunity for profit and loss, the permanency and exclusivity of the employment, and the degree of skill required to perform the job. *Second*, the Court held without explanation that "little relative weight" (App. 19a) should be assigned to two other factors traditionally considered important by this Court and other Courts of Appeals -- ownership of the facilities where the work is performed and performance of a specialty job integral to the business. Like the District Court, the Court of Appeals therefore concluded that Petitioners were employed only by Miller and not Long & Scott.

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[8] More specifically, Petitioners' complaints alleged that both Long & Scott and Miller violated two provisions of the FLSA, 29 U.S.C. §§ 211, 206(a) (1988 & Supp. IV 1992), and multiple provisions of the AWPA, including 29 U.S.C. § 1821(a),(d)(1)-(2),(e), § 1822(a), § 1831(c)(1)-(2), § 1832(a), § 1841(b)(1)(A) & (C) (1988). Additionally, certain other claims were made only against Miller.

REASONS FOR GRANTING THE WRIT

This case presents important and recurring questions concerning the scope of the joint employer doctrine in agriculture under the FLSA and the AWPA. The FLSA broadly defines "employ" as "including to *suffer or permit to work.*" 29 U.S.C. § 203(g) (1988) (emphasis added). As recognized by this Court, "[a] broader more comprehensive coverage of employees within the stated categories would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945); *see also Nationwide Mutual Ins. Co. v. Darden*, 112 S. Ct. 1344, 1350 (1992). The breadth with which the FLSA defines the employment relationship is consistent with its purposes of eliminating "low wages and long hours" and of freeing "commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947); 29 U.S.C. § 202 (1988).

In accordance with the FLSA's broad definitions and remedial purposes, the common law control test has been flatly rejected.[9]

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[9] *See, e.g.*, *Rutherford Food Corp.*, 331 U.S. at 729 (concept of employment under FLSA is broader than at common law); *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 299 (5th Cir. 1975) ("The terms 'independent contractor,' 'employee', and 'employer' are not to be construed in their common law senses when used in federal social welfare legislation."); *see also United States v. Silk*, 331 U.S. 704, 713

Instead, the employment relationship for purposes of the FLSA is an economic dependency test that looks to the totality of the circumstances.[10]

Joint employment relationships have long been recognized under the FLSA.[11] Under FLSA regulations, "[a] single individual may stand in the relation of an employee to two or more employers at the same time"; a joint employer relation is deemed to exist when "employment by one employer is not completely disassociated from employment by the other employer(s)"; and a joint employment determination "depends upon all the facts in the particular case." 29 C.F.R. § 791.2 (1993).

The AWPA expressly incorporated the FLSA's broad definition of "employ." 29 U.S.C. § 1802(5). The reason for incorporating that definition is unmistakable:

> The Committee's use of this term was deliberate and done with the clear intent of adopting the "joint employer" doctrine as a central foundation of this new statute; it is the indivisible hinge between certain important duties imposed for the protection of

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(1947) (rejecting common law control test [Social Security Act]).

[10] *See Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961) ("economic reality" rather than "technical concepts" is the test of employment); *Rutherford Food Corp.*, 331 U.S. at 730 ("[T]he determination of the [employment] relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity."); *see also Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) ("[I]n the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service.").

[11] *See, e.g., Rutherford Food Corp.*, 331 U.S. 722; *Falk v. Brennan*, 414 U.S. 190 (1973); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973); *Hodgson v. Okada*, 472 F.2d 965 (10th Cir. 1973).

> migrant and seasonal workers and those liable for any breach of those duties.

H.R. Rep. No. 885, 97th Cong., 2d Sess. at 6, *reprinted in* 1982 U.S.C.C.A.N. 4547, 4552 ("1982 H.R. Rep."). The AWPA regulations make explicit that "*[j]oint employment* under the Fair Labor Standards Act is *joint employment* under the [AWPA]." 29 C.F.R. § 500.20 (h)(4). "[J]oint employment relationships are common in agriculture and have often been addressed by the Federal courts." *Id.* § 500.20(h)(4)(ii).

I. IN APPLYING A FUNDAMENTALLY DIFFERENT EMPLOYMENT TEST IN A JOINT EMPLOYER SITUATION VERSUS A SINGLE-EMPLOYER SITUATION THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The decisions of this Court and other Courts of Appeals establish that the same test applies to determine economic dependence and the existence of an employment relationship in both single and joint employer situations, i.e., whether, in light of the totality of the circumstances, the workers are economically dependent upon one or more putative employers.[12] The factors or indicia of economic dependence and employment applied by this Court and other Courts of Appeals in these decisions include: (1) the nature and degree of control of the workers; (2) the degree of supervision, direct or indirect, of the work; (3) the power to determine pay rates or methods of payment; (4) the right, directly or indirectly, to hire, fire, or modify employment conditions; (5) preparation of payroll and payment of wages; (6) ownership of property or facilities where the work occurred; (7) performance of a specialty job within the production line integral to the business; (8) investment in equipment and facilities; (9) opportunity for profit or loss; (10) permanency and exclusivity of employment; and (11) degree of skill required to perform the job.

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[12] *See, e.g.*, *Falk v. Brennan*, 414 U.S. at 195; *Rutherford Food Corp.*, 331 U.S. at 730; *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987) (employment under FLSA), *cert denied*, 488 U.S. 898 (1988); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1327-29 (5th Cir. 1985) (employment under FLSA); *Castillo v. Givens*, 704 F.2d 181 (5th Cir.) (same), *cert. denied*, 464 U.S. 850 (1983); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754-56 (9th Cir. 1979) (same analysis for sole employer and joint employer); *Griffin & Brand of McAllen, Inc.*, 471 F.2d at 237-38 (FLSA joint employment case); *Antunez v. G&C Farms*, 126 Lab. Cas. (CCH) ¶ 33,015 at 46,173 (D.N.M. 1993) (joint employment case under FLSA and AWPA); *Monville v. Williams*, 107 Lab. Cas. (CCH) ¶ 34,979 at 42,253-54 (D. Md. 1987) (employment under FLSA); *Haywood v. Barnes*, 109 F.R.D. 568, 587 (E.D.N.C. 1986) (joint employment under FLSA and

The Eleventh Circuit decision holds that a fundamentally different test is to be used in the joint employer context. For example, while acknowledging the relevance of all factors in the single employer context, the Eleventh Circuit held that the last four factors listed above "are of no value to joint employment determinations" and that the two immediately preceding factors are to be accorded "little relative weight." App. 18a, 19a. The view that a different test applies to joint employment has been explicitly rejected by this Court and other Courts of Appeals.

In *Rutherford Food Corp.*, for example, a slaughterhouse contracted with an independent contractor to debone beef, and the independent contractor, in turn, hired individual deboners to perform the work. Under the agreement with the slaughterhouse, the independent contractor had "complete control over the other boners, who would be his employees," and the deboners used their own tools. 331 U.S. at 725. In deciding whether the workers were employed solely by the chief deboner or jointly by the slaughterhouse, the Court followed the test applied in single employer cases and looked to "the circumstances of the whole activity." *Id.* at 729-30. Since the workers performed a specialty

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AWPA); *Maldonado v. Lucca*, 629 F.Supp. 483, 487-88 (D.N.J. 1986) (joint employment under FLSA).

job which was "a part of the integrated unit of production," the employment occurred on the premises of the slaughterhouse, the workers profited from efficiency rather than by judgment or initiative, and the slaughterhouse managers quietly "kept close touch on the operation," the Court held that the slaughterhouse jointly employed the deboners. *Id.* at 730.

Nowhere in *Rutherford Food Corp.*, a case repeatedly cited as setting the standard for joint employment,[13] did the Court indicate that the appropriate test for joint employment is any different from that applied in the single employer situation. Other decisions of this Court implicitly hold that there is a uniform test for employment and implicitly reject a separate and different analysis for joint employment. *See, e.g., Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964) (in discussing whether Greyhound was a joint employer of cleaners employed by a cleaning contractor for purposes of the National Labor Relations Act, the Court explained that the joint employment analysis is "unaffected by any possible determination as to [the cleaning firm's] status as an independent contractor"); *Falk v. Brennan*, 414 U.S. 190, 195 (1973) (real estate management company and owners of apartment complexes jointly employed maintenance personnel).

As far as Petitioners are aware, before the Eleventh Circuit's decision, every Court of Appeals that had decided a joint employer case had applied the same test that was used in single employer cases, and not a single Court of Appeals had created a different test for joint employment cases. For example, in *Wirtz v. Lonestar Steel Co.*, 405 F.2d 668 (5th Cir. 1968), the Fifth Circuit considered whether a steel mill operator who utilized independent contractors to haul iron ore from its mine to its plant was the joint employer of the individual haulers for purposes of the Social Security Act. While not finding joint employment, the court expressly held that the same standards and factors were equally relevant in "[c]onsidering whether a person or corporation is an 'employer' or 'joint employer.'" *Id.* at 669.

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[13] *See, e.g., Griffin & Brand of McAllen, Inc.*, 471 F.2d at 237; *Howard*, 852 F.2d 101, 105 (4th Cir. 1988); *Real*, 603 F.2d at 754-55; *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668, 669 (5th Cir. 1968); *Antunez*, 126 Lab. Cas. (CCH) at 46,174; *Haywood*, 109 F.R.D. at 585-87; *Maldonado*, 629 F.Supp. at 487; *Leach v. Johnston*, 812 F.Supp. 1198, 1206 (M.D. Fla. 1992).

The Fifth Circuit has specifically held that the *Lonestar* approach applies to FLSA joint employment cases in agriculture. In *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237-38 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973) a joint employment case cited with approval in both the legislative history of the AWPA and in the AWPA regulations themselves,[14] the court held that a fruit and vegetable farmer was the joint employer of harvest workers recruited by a crewleader. The court based its determination on the five factors applied in *Lonestar* and described the *Lonestar* test as "the proper approach to be taken" in assessing joint employment status. 471 F.2d at 237-38. Numerous other Courts of Appeals and District Courts have applied the single employer test in joint employer cases and have used one or more of the eleven factors listed above to judge economic dependency.[15]

The FLSA and AWPA regulations both confirm that a joint employment determination "depends upon *all* the facts in the particular case." 29 C.F.R. § 791.2 (emphasis added); 29 C.F.R. § 500.20(h)(4)(i) (same). While the AWPA regulations specifically enumerate the first five of the eleven factors identified above, the regulations state that the relevant factors "include, *but*

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[14] 1982 H.R. Rep. at 7; 29 C.F.R. § 500.20(h)(4)(ii).

[15] *See, e.g.*, *Real*, 603 F.2d at 754-57 (9th Cir.); *Griffin & Brand of McAllen, Inc.*, 471 F.2d at 237-38 (5th Cir.); *Lone Star Steel Co.*, 405 F.2d at 669 (5th Cir.); *Howard*, 852 F.2d at 104-05 (4th Cir.); *Okada*, 472 F.2d at 968-69 (10th Cir.); *Antunez*, 126 Lab. Cas. (CCH) at 46,174 (D.N.M.); *Leach v. Johnston*, 812 F.Supp. at 1207 (M.D. Fla.); *Haywood*, 109 F.R.D. at 587 (E.D.N.C.); *Maldonado*, 629 F.Supp. at 487-88 (D.N.J.).

are not limited to," the five listed factors. *Id.* § 500.20(h)(4)(ii) (emphasis added). The AWPA regulations expressly approve cases that hold that the same standard applies in single and joint employer cases. *Id.*[16]

The Eleventh Circuit's decision conflicts with the foregoing decisions because it applies a test in joint employer cases that fundamentally differs from the test in single employer cases. In view of the conflict caused by the Eleventh Circuit's radical departure from the long-accepted unified test, this Court should grant certiorari.

II. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS BY HOLDING THAT INDIRECT CONTROL AND SUPERVISION ARE IRRELEVANT IN A JOINT EMPLOYMENT CONTEXT.

The Eleventh Circuit held that the control and supervision factors set forth in the AWPA regulations in a joint employer situation are limited by the traditional common law "control" test and are satisfied only if there is "direct" control and "continuous" supervision. App. 9a-12a. By requiring direct control and continuous supervision, the Eleventh Circuit's decision conflicts with decisions of this Court and other Courts of Appeals.

The Eleventh Circuit recognized that the undisputed record in this case established that (i) the grower retained sole control over all planting decisions -- decisions that determined the nature and amount of work available; (ii) the grower specifically directed the farm labor contractor as to when to harvest and which parcels of land to harvest; and (iii) the grower directed the contractor with respect to the specific activities of the workers.[17] App. 9a-11a.

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[16] The difference between a single and joint employment relationship is that where the responsibilities of the employer are shared between two entities, neither will exercise all the prerogatives of an employer. Thus joint employer status exists where some, but not all of the relevant factors are present.

The Eleventh Circuit dismissed the foregoing facts as evidencing "abstract notions of control," holding that "the focus is more properly limited to specific indicia of control" such as "*direct* employment decisions." App. 10a (emphasis added). The court also stated that "agricultural decisions -- decisions which only *indirectly* affected the number of workers necessary to harvest the land -- cannot be likened to 'control' in the FLSA/MSAWPA sense." App. 10a (emphasis added). Instead, the court explained, "[c]ontrol arises . . . when the farmer goes beyond general instructions . . . and begins to assign specific tasks, to assign specific workers, or to take an *overly* active role in the oversight of the work." App. 11a (emphasis added).

The Eleventh Circuit similarly limited the supervision factor. The court apparently accepted that Long & Scott "oversaw each day's production (as well as the post-picking task of grading the vegetables)," App. 11a, but the court characterized this as "minimal oversight" and believed that an employer must provide more specific "direction to appellants' work." App. 12a. In other words, the grower must engage in "direct and continuous supervision"; "infrequent assertions of oversight [by the grower] do not rise to the level of supervision necessary to satisfy this factor." App. 12a.[18]

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[17] In acknowledging these facts, the Eleventh Circuit undercuts its own conclusions that Miller "exercised absolute, unfettered, and sole control over appellants and their employment" (App. 10a), and that Miller was responsible for "the majority of picking decisions" (App. 11a).

[18] Similarly, in discussing the wages factor the court rejected plaintiffs' argument that Long & Scott "indirectly controlled" the workers' pay rates or methods of payment even though the plaintiffs showed that Miller's compensation -- and therefore the workers' wages -- were dependent upon the rates Long & Scott paid to Miller. App. 12a-14a. The court hypothesized that "even if Long & Scott were to pay Miller

The Eleventh Circuit's definitions of the terms "control" and "supervision" in the "FLSA/MSAWPA sense" conflict with decisions of this Court. This Court has held repeatedly that a central feature of the FLSA is its repudiation of the common law's direct "power of control" test and its shift to economic dependence. *United States v. Silk*, 331 U.S. 704, 713, (1947); *see also Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. at 1349-50; *Goldberg v. Whitaker House Cooperative Inc.*, 366 U.S. 28, 33 (1961); *Rutherford Food Corp.*, 331 U.S. at 729. By incorporating the FLSA's broad definition of "employ" into the AWPA, Congress unequivocally expressed its intent that the employment relationship *not* be construed in its "limiting common law sense," and made "clear that it is economic reality, not contractual labels, nor isolated factors which is to determine employment relationships under this Act." 1982 H.R. Rep. at 6, 7. Accordingly, this Court has held that the control and supervision factors under FLSA and AWPA do not require proof of control or supervision in the common law sense.

While the Court below and the Sixth Circuit[19] have adopted a contrary view in construing the control and supervision factors, numerous other Court of Appeals decisions have also treated direct control and continuous supervision as unnecessary and have focused instead on the "all pervasive determinant economic depen-

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more money (with the intent that Miller use the extra money to increase appellants' wages), Miller would have been free to retain the increase." App. 13a. This approach deemphasizes "economic reality" -- even disparages it as from the "Euclidian world" (App. 13a) -- and accords undue significance to the power to set the specific terms of the direct disbursements to the workers. Indeed, the undisputed facts confirmed that Miller never raised Petitioners wages *unless* Long & Scott increased the rates paid Miller. (RSF1: Miller dep. 106-07, 191.) Given the premise that Long & Scott did not pay the workers directly, the court mistakenly deduces that "Miller possessed exclusive control over appellants' compensation, and appellants were economically dependent solely on Miller." App. 13a.

[19] *Donvan v. Brandel*, 736 F.2d 1114, 1119 (6th Cir. 1984).

dence." *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1310 (5th Cir.), *cert. denied*, 429 U.S. 826 (1976). In *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 (9th Cir. 1979), the Ninth Circuit held that the putative employer, DSA, "effectively, though *indirectly*, controls certain important decisions in growing the strawberries, including the spacing of the plants, [and] when and how much fertilizer is to be applied." *Id.* at 756 (emphasis added). It also noted that "DSA may *ultimately* determine the amount the appellants are paid for their labor." *Id.* (emphasis added). Similarly, the Tenth Circuit in *Hodgson v. Okada*, 472 F.2d 965 (10th Cir. 1973), ruled that "the Okadas were employers of the farm workers because they were acting directly *or indirectly* in the interest of an employer." *Id.* at 969 (emphasis added). Likewise, the Fifth Circuit does not require control and supervision of the "details" of the work and finds a farmer's overall control over an integrated farming operation, including control over planting, and when, where and how much to harvest, to be probative of economic dependence. *Castillo v. Givens*, 704 F.2d 181, 189 (5th Cir.), *cert. denied*, 464 U.S. 850 (1983); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1328 (5th Cir. 1985).[20] Other courts have also found this same sort of indirect control and supervision to be significant in finding the existence of an employment relationship.[21]

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[20] *See also Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1060 (2d Cir. 1988) ("An employer does not need to look over his workers' shoulders every day in order to exercise control."); *Castillo*, 704 F.2d at 190 ("This Court has on several occasions found employment status even though the defendant-employer had no control over certain aspects of the relationship, *e.g.*, the right to set hours, hire and fire, or determine wages.").

[21] *See, e.g., Lauritzen*, 835 F.2d at 1536 (7th Cir.); *Tobin v. Anthony-Williams Mfg. Co.*, 196 F.2d 547, 549-50 (8th Cir. 1952); *Cavazos v. Foster*, 822 F.Supp. 438, 440, 442 (W.D. Mich. 1993); *Leach*, 812 F.Supp. at 1207 (M.D. Fla.); *Monville v. Williams*, 107 Lab. Cas. (CCH) at 45,253 (D. Md.); *Donovan v. Gillmor*, 535 F.Supp. 154, 161 (N.D. Ohio 1982), *appeal dismissed*, 708 F.2d 723 (6th Cir. 1982);

The Eleventh Circuit's focus and emphasis on *direct* control and continuous supervision in a case involving unskilled labor and piecework is particularly indefensible. "Piecework in itself makes pointless much of the control which normally would be exercised over employees paid by the hour," because the pay system itself is designed to motivate the workers to pick quickly and with care. *Fahs v. Tree-Gold Co-op Growers of Florida, Inc.*, 166 F.2d 40, 44 (5th Cir. 1948); *see also Castillo*, 704 F.2d at 189 n.17 ("it is the nature of the farming business that the farmer has to depend on his workers -- the farmer cannot be in the fields supervising at all times").

By insisting on direct control and continuous supervision, the Eleventh Circuit has rendered a decision that conflicts with longstanding decisions of this Court and of numerous Courts of Appeals.

Mendez v. Brady, 618 F.Supp. 579, 582 (W.D. Mich. 1985). In *Antunez*, for example, the court emphasized the following facts:

> G&C Farms exercised tremendous control over the farming operation and the farm workers. In addition to deciding when and how much chile to plant, when to thin, irrigate and spray pesticides, and when to harvest, Gary Riggs determined the picking specifications that the workers were to follow. He also determined how much chile would be picked each day. Gary Riggs or Duane Riggs informed the labor contractors what fields needed to be harvested, how many boxes needed to be filled and whether poor quality chile or debris was being picked.

126 Lab. Cas. (CCH) ¶ 33,015 at 46,175 (D.N.M. 1993).

III. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS IN REJECTING FOUR TRADITIONAL FACTORS PROBATIVE OF ECONOMIC DEPENDENCE AND ACCORDING OTHERS "LITTLE RELATIVE WEIGHT."

A. The Eleventh Circuit's Rejection Of Four Relevant Factors Creates A Substantial And Irreconcilable Conflict.

The Eleventh Circuit also held that four specific factors -- factors traditionally applied by this Court and other Courts of Appeals to test whether an employee is economically dependent upon a putative employer -- are irrelevant and of "no value to joint employment determinations." App. 18a. The factors discarded by the Eleventh Circuit are: (i) investment in equipment and facilities; (ii) opportunity for profit and loss; (iii) permanency and exclusivity of employment; and (iv) the degree of skill required to perform the job. App. 15a-17a.

The Eleventh Circuit's repudiation of these four factors conflicts with prior decisions of this Court which specifically recognize the relevance of each of the four rejected factors in analyzing employment relationships. *See, e.g., Rutherford Food Corp.*, 331 U.S. at 730 (discussing opportunity for "profits" in relation to "initiative, judgment or foresight" versus the "efficiency" associated with "piecework" in finding that beef deboners hired by independent contractors were jointly employed by slaughterhouse); *see also, Silk*, 331 U.S. at 716 (identifying "opportunities for profit or loss, investment in facilities, permanency of relation and skill required" as among the relevant factors); *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (recognizing all four factors repudiated by Eleventh Circuit as relevant to economic dependency). The Eleventh Circuit's refusal to consider such factors simply cannot be squared with this Court's decisions applying these same factors in joint employment cases such as *Rutherford Food Corp.*

The Eleventh Circuit's rejection of the foregoing factors also directly conflicts with decisions of the Ninth, Fifth and Fourth Circuits expressly recognizing the relevance of these four factors in joint employment cases. In *Real*, 603 F.2d at 757, the Ninth Circuit considered each of the four factors in holding that a supplier of strawberry plants and the owner of the farm jointly employed the farm labor workers.[22] Notably, the *Real* decision is cited favorably in the AWPA joint employment regulations. 29 C.F.R. § 500.20(h)(4)(ii).

Similarly, the Fifth Circuit in *Fahs*, 166 F.2d at 45, applied each of these four factors in holding that workers who assembled, labelled, and loaded fruit boxes were jointly employed by the packing house and the independent contractor who hired them. In the leading Fourth Circuit case, *Howard v. Malcolm*, 852 F.2d 101, 104-05 (4th Cir. 1988), the court held that, under the facts of that case, there was no joint employment relationship but also held that each of the four factors rejected by the Eleventh Circuit were relevant to the joint employment analysis.

The Eleventh Circuit's decision is also at odds with many District Court decisions applying these factors in joint employment cases. In *Haywood*, 109 F.R.D. at 587-92, a case very similar to this case, the Court analyzed each of these four factors and held that the owners and operators of a farm and the farm labor contractor were joint employers of the farm workers under the AWPA. Again, in *Antunez v. G&C Farms*, 126 Lab. Cas. (CCH) ¶ 34,979 at 42,253 (D.N.M. 1993), the Court considered each of these factors in holding that a farmer and farm labor contractor jointly employed farm workers for purposes of the AWPA and FLSA. The rejection of the four factors also conflicts with Court of Appeals and District Court decisions from virtually every circuit applying each of these factors in single employer cases to evaluate economic dependency and determine whether an employment relationship exists.[23]

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[22] The *Aimable* court mistakenly states that joint employment was not at issue in *Real*. App. 15a. In fact, joint employment (in addition to single employment) was at issue and addressed in the Ninth Circuit's opinion. *Real*, 603 F.2d at 755-56.

There is no logical basis for the Eleventh Circuit to disregard the four factors in a joint employment context. Each of those factors is probative of economic dependency and the existence of an employment relationship. A worker who supplies his own equipment used to perform work is more self-sufficient than a worker who depends on equipment provided by a putative employer. Where two putative joint employers provide the equipment and facilities, the worker is dependent upon more than one person and remains economically dependent upon the combined capital investment of the two. A farm worker is even more economically dependent upon a grower for work and wages where the grower, as here, retains the risk of profit and loss, and the workers perform unskilled physical labor. Finally, economic dependency is magnified where, as here, seasonal harvest work is "largely . . . exclusive." (App. 16a.)

The Eleventh Circuit's repudiation of the four factors cannot be squared with prior decisions of this Court and decisions from numerous other circuits. The petition should be granted to resolve the resulting decisional conflict.

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[23] *See, e.g.*, *Brock v. Superior Care*, 840 F.2d at 1058-59 (2d Cir.) (applying each of the four factors rejected by Eleventh Circuit); *Martin v. Selker Brothers, Inc.*, 949 F.2d 1286, 1293-96 (3d Cir. 1991) (same); *Thomas v. Brock*, 617 F. Supp. 526, 534-35 (E.D.N.C. 1985) (same) *aff'd in relevant part*, 810 F.2d 448 (4th Cir. 1986); *Usery v. Pilgrim Equipment Co.*, 527 F.2d at 1311-15 (5th Cir.) (same); *Brandel*, 736 F.2d at 1117-20 (6th Cir.) (same); *Lauritzen*, 835 F.2d at 1535-38 (7th Cir.) (same); *Tobin v. Anthony-Williams Mfg. Co.*, 196 F.2d at 549-50 (8th Cir.) (same); *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370-73 (9th Cir. 1981) (same); *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989) (same); *Cavazos*, 822 F. Supp. at 442 (W.D. Mich.) (same); *Aviles v. Kunkle*, 765 F. Supp. 358, 363 (S.D. Tex. 1991) (same), *vacated for lack of personal jurisdiction*, 987 F.2d 201 (5th Cir. 1992); *Mendez v. Brady*, 618 F.Supp. at 582 (W.D. Mich.) (same).

B. The Decision Below Conflicts With Decisions Of This Court And Other Courts Of Appeal By According "Little Relative Weight" In The Joint Employment Context To Ownership Of The Premises And Performance Of Work Integral To The Business.

The Eleventh Circuit acknowledged that two other factors -- ownership of the property or facilities where the work occurred and performance of a specialty job integral to the business -- indisputably favored Petitioners. App. 17a-18a.[24] Nonetheless, without citation to authority or explanation, the court below held that these two factors "bear little relative weight." App. 19a. The Eleventh Circuit's treatment of these two factors is in stark conflict with decisions of this Court and other Courts of Appeals.

First, in assigning relatively little weight to facilities and premises ownership, the Eleventh Circuit's decision conflicts with decisions of this Court and other Courts of Appeals which have considered this factor to be significant when considered in light of the totality of the circumstances. For example, in *Rutherford Food Corp.*, 331 U.S. at 730, one of the factors specifically considered by this Court in finding the slaughterhouse to be an employer was the very fact that the "premises and equipment" used for the work were owned by the slaughterhouse. This factor has also been considered pertinent in numerous decisions by other courts with no indication that it is to be accorded little relative weight. *See, e.g., Griffin & Brand of McAllen, Inc.*, 471 F.2d at 237-38; *see also Haywood*, 109 F.R.D. at 587-88.

Second, while the Eleventh Circuit assigns "little relative weight" to performance of a specialty job integral to the business, this Court and other Courts of Appeals consider this factor to be of paramount importance. For example, in *Rutherford Food Corp.*, a primary consideration relied upon by this Court in holding that the slaughterhouse was a joint employer of meat deboners hired by a contractor was the fact that the deboners "did a specialty job on the production line." 331 U.S. at 730. The Court emphasized throughout its opinion that the deboners performed a function in the middle of the overall process of slaughtering, preparing the meat for boning, packing and shipping, all of which was done by the slaughterhouse employees. *Id.* at 724-25. Consistent with this Court's approach, numerous Courts of Appeals have assigned this factor substantial weight. *See, e.g.*, *Lauritzen*, 835 F.2d at 1537; *Beliz*, 765 F.2d at 1328; *Castillo*, 704 F.2d at 191; *Real*, 603 F.2d at 755. Thus, the Eleventh Circuit's treatment of this factor as deserving "little relative weight" conflicts with decisions of this Court and other Courts of Appeals.

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[24] "There is no dispute that appellants worked on land owned by Long & Scott." App. 17a. "Since appellants performed a line-job integral to the harvesting and production of saleable vegetables, we conclude that this factor also supports appellants." App. 17a.

IV. THIS CASE PRESENTS IMPORTANT AND RECURRENT ISSUES OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT.

This case is particularly appropriate for review as it presents sharply framed federal questions involving legal standards imposed by important federal statutes. As the Eleventh Circuit recognized, "the determination of joint employment is a question of law." App. 9a.

The proper test for determining joint employment status is a recurring question of great practical importance. As the AWPA regulations recognize, "joint employment relationships are common in agriculture and have often been addressed by the Federal courts." 29 C.F.R. § 500.20(h)(4)(ii).

The aggregate annual population of migrant and seasonal farm workers and their families across the country exceeds four million.[25] As was noted in 1982, when Congress adopted the AWPA, "many migrant and seasonal agricultural workers remain today, as in the past, the most abused of all workers in the United States." 1982 H.R. Rep. at 2. The same is true today as wrongful "withholding" of workers' pay and failure to pay minimum wages in violation of the FLSA and AWPA continue to be common.[26]

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[25] United States Dep't of Health & Human Services, *Atlas of State Profiles Which Estimate Number of Migrant and Seasonal Farmworkers and Members of Their Families* at 13 (1990).

Efforts to enforce these laws against crewleaders, who are the ostensible employers, have been unsuccessful. Most are fly-by-night operators and, even if located, are effectively judgment-proof. *Report of the Comm'n on Agricultural Workers* at xxvii (Nov. 1992). The problem of abuses under the crewleader system continues to grow acute, as "[i]n recent years farm labor contractors (FLCs) increasingly have filled the role of matching seasonal workers with jobs." *Id.* at 135. The facts of this case illustrate a notorious and familiar pattern: a large farm retains an individual crewleader to hire and supervise migrant workers; the crewleader, usually undercapitalized, evasive and often judgment-proof is interposed by the farmer as a legal shield against liability for minimum wage. Through this system, "the grower retains total control over the worker with no accountability." *Id.* at 150-151 (statement of Commissioner Dolores Huerta).[27]

A central purpose of the AWPA was to prevent just such "adroit schemes." *Cf. Silk*, 331 U.S. at 712. The statute that preceded the AWPA, the Farm Labor Registration Act of 1963 ("FLCRA"), guaranteed minimum wages and attempted to redress the exploitation of migrant farm workers by regulating farm labor contractors. This statute focused on "the crewleader, a middleman who recruited, transported and supervised migrant and seasonal workers and who was thought to be not only the primary violator, but the most unscrupulous." 1982 H.R. Rep. at 2. However, efforts to force crewleaders to comply with regulatory requirements including the minimum wage requirements of the FLSA were an abject failure and "many of the abuses which were the subject of the 1963 legislation . . . continued unabated." *Id.* Problems continued to arise because almost all duties under that statute "run through the farm labor contractor." *Id.*

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[26] *Report of the Comm'n on Agricultural Workers* at 47 (Nov. 1992); *see also ABA Study of Federally Funded Legal Aid for Migrant Farmworkers* 18 (June 1993) (farmers and crewleaders frequently violate federal minimum wage laws).

[27] Commissioner Huerta specifically cited the crewleader involved in this case for his role in schemes to evade responsibilities imposed by the AWPA: "Licensed contractors are some of the most notorious such as John Miller and Willie Simmons." *Report of the Comm'n on Agricultural Workers* at 150. True to form, Miller has himself recently filed for bankruptcy. *In re John Miller, Jr., Rudeen Quince Miller, Debtors*, Chapter 13, No. 94-2166-8G3 (U.S. Bankr. Ct., M.D. Fla.).

Congress ultimately corrected these problems by repealing FLCRA, 1982 H.R. Rep. at 3-4, and enacting the AWPA. The AWPA adopted "a completely new approach" to guaranteeing the vindication of farm worker rights by shifting the focus away from the farm labor contractor and toward the grower and contractor jointly. 1982 H.R. Rep. at 2-3; *see also* 128 Cong. Rec. 26,008 (1982) (statement of Rep. Miller) ("Through the use of the concept of 'joint employer' the agricultural employer or association will, for the first time, be responsible for the protection of the workers. No longer must the migrant workers look solely to the crewleader for relief.").

The structure of the AWPA makes clear that only in unusual circumstances will farmers who receive the benefits of the work performed by those who toil in their fields not be responsible for satisfying the substantive provisions of the AWPA as well as minimum wage provisions:

> Agricultural employers will be relieved of the excessive burdens of FLCRA and will for the first time be sure of their duties to migrant workers. Agricultural employees will, in turn, know who is responsible for their protection, by fixing the responsibility on those who ultimately benefit from their labors -- the agricultural employer.

128 Cong. Rec. 23,499 (1982) (statement of Rep. Miller).

Thus, Congress specifically intended that farmers not be able to insulate themselves from obligations such as here for minimum wages by simply contracting with a farm labor contractor, even where the farm labor contractor would be an independent contractor under the common law. "[E]ven if a farm labor contractor is found to be a bona fide independent contractor, . . . this status does not as a matter of law negate the possibility that an agricultural employer or association may be a joint employer of the harvest workers and jointly responsible for the contractor's employees." 1982 H.R. Rep. at 7. The Eleventh Circuit's approach conflicts with this statutory structure by according special significance to the farm labor contractor's status as an independent contractor and making it a hurdle to overcome in order to find that a grower is a joint employer. The Eleventh Circuit's decision thus jeopardizes the rights of hundreds of thousands of migrant workers in one of the most important agricultural regions of the country and, if extended to other circuits, will affect hundreds of thousands more.

Moreover, by developing a new test for joint employment determinations, the Eleventh Circuit has rendered uniform enforcement of the important national policies behind the AWPA impossible. If different standards are permitted to develop for the imposition of substantive duties under the AWPA, employers not in compliance will stand to "gain a competitive advantage over those employers in full compliance with the various laws and regulations." *Report of the Comm'n on Agricultural Workers* at 138. This in turn will further frustrate the purposes of both the FLSA and AWPA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Petitioners also request that this Court invite the filing of a memorandum by the United States Department of Labor in this case.

Respectfully submitted,

TIMOTHY B. DYK
(*Counsel of Record*)
DANIEL D. McMILLAN
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

GREGORY S. SCHELL
ROBERT A. WILLIAMS
FLORIDA RURAL LEGAL
SERVICES, INC.
406 S.E. Avenue E
Suite 102
Belle Glade, Florida 33430
(407) 996-5266

Counsel for Petitioners

August 8, 1994

APPENDIX

Vergnaud AIMABLE; Alain Alcin;
Gerta Alcin; Orasis Alcindor; Joseph
Miguel Alcius, et al.,
Plaintiffs-Appellants,

v.

LONG AND SCOTT FARMS; John
Miller, Jr.,
Defendants-Appellees.

Leclerc DENEUS; Charlonet Gue; Alphonse
Amilcar; Marie Andre; Rosette Charles;
Donald Ernest; Wilfride Jean Eugene,
et. al.,
Plaintiffs-Appellants,

v.

LONG AND SCOTT FARMS; John
Miller, Jr.,
Defendants-Appellees.

No. 92-2749

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

May 10, 1994

Appeals from the United States District Court
for the Middle District of Florida.

Before TJOFLAT, Chief Judge, BIRCH, Circuit Judge, and HENDERSON, Senior Circuit Judge.

TJOFLAT, Chief Judge:

In this case, we must decide whether a farm, which contracted with a farm labor contractor to provide laborers to harvest its crops, was the "joint employer" of those laborers for purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1988), and the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-72 (1988 & Supp. 1993). On cross-motions for summary judgment, the district court held that the farm was not the laborers' joint employer and entered judgment for the farm; the laborers appealed. We affirm.

I

Appellants (plaintiffs in two consolidated cases in the district court) are 206 migrant and seasonal farm workers.[1] At various times between 1985 and 1989, each alleges to have been employed by John Miller, Jr.,[2] to harvest crops grown by appellee Long & Scott Farms, Inc. ("Long & Scott"), the owner and operator of a 1,200-acre vegetable farm in Florida. Frank Scott, the owner of a one-half share in Long & Scott, managed the day-to-day operations of the farm.

John Miller is a farm labor contractor with whom Long & Scott dealt for twenty-five years. As a farm labor contractor, Miller agrees to provide workers to harvest farmers' labor-intensive crops. Miller then recruits the required number of laborers (sometimes from out-of-state locations; at other times from migrant camps, small towns, or other farms in Florida); he also provides many of the laborers with housing at his labor camp and/or transportation to the work sites.

During Long & Scott's relationship with Miller, Long & Scott used no other contractor to supply laborers for its corn, cabbage, and cucumber crops. Miller, on the other hand, provided laborers to other farms, but only when that work would not interfere with his obligations to Long & Scott. During the period in question (1985-89), Long & Scott provided Miller with his largest single source of revenue. Nonetheless, because of Miller's other contracts, Long & Scott accounted for less than half of Miller's total revenue. Long & Scott paid Miller a flat rate, determined at the beginning of the produce season, for each quantity of produce picked. Similarly, Miller compensated most of his employees on a piece-rate basis.

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[1] Although Congress separately defined "migrant" and "seasonal" agricultural workers, *see* 29 U.S.C. §§ 1802(8) & (10), the statutory distinction is without substance for purposes of this appeal.

[2] Miller, along with Long & Scott Farms, Inc., was a defendant in both district court cases; Miller, however, is not a party to this appeal. *See* note 4, below.

Appellants filed these two suits against Miller and Long & Scott under the Fair Labor Standards Act ("FLSA") and the Migrant and Seasonal Agricultural Worker Protection Act ("MSAWPA").[3] After extended discovery, appellants and defendant Long & Scott filed cross-motions for summary judgment in both cases. The district court granted appellants' motions in part, holding that Miller was appellants' employer for purposes of FLSA and MSAWPA.[4] The district court, however, found that Long & Scott was not appellants' joint employer; thus, the district court denied appellants' motions for summary judgment to the extent they related to Long & Scott. Concurrently, the district court granted Long & Scott's cross-motions for summary judgment and subsequently entered final judgments in both cases in favor of Long & Scott. It is from these judgments that appellants appeal.[5]

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[3] Appellants' complaint also alleged violations by Miller under the Federal Insurance Contributions Act ("FICA"), 26 U.S.C. §§ 3101 *et seq.* (1988), and the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. §§ 3301 *et seq.* (1988). The district court has yet to rule on these allegations, so they currently are not before us.

[4] In finding that Miller was appellants' employer, the district court acknowledged that Miller disputed whether each of the 206 appellants had, in fact, worked for him. Because Miller's protestations created genuine issues of material fact as to certain laborers, the district court properly denied appellants' motion for summary judgment as to those contested individuals. Nonetheless, there was no issue of material fact as to the district court's larger holding: in general, Miller was appellants' employer. Miller has not contested this general holding either in the district court or on appeal.

Pending the resolution of Long & Scott's appeal, the district court stayed all proceedings in both cases concerning appellants' claims against Miller.

II

In 1983, Congress enacted the Migrant and Seasonal Agricultural Worker Protection Act "to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers . . . and to assure necessary protections for migrant and seasonal agricultural workers. . . ." 29 U.S.C. § 1801. Among its many provisions, MSAWPA required that agricultural employers register with the government, maintain certain employment records for migrant and seasonal agricultural workers, and comply with sundry housing, transportation, and compensation provisions. *See* 29 U.S.C. §§ 1811-1844. If an employer fails to adhere to any of the provisions in MSAWPA (as well as to any of the regulations promulgated pursuant to it), MSAWPA creates a private right of action in federal court on behalf of all aggrieved persons; MSAWPA further empowers district courts to impose actual damages or statutory damages of $500 per plaintiff per violation. 29 U.S.C. §§ 1854(a) & (c).

Under MSAWPA, 29 U.S.C. § 1802(5), "employ" is defined by reference to FLSA: "'Employ' includes to suffer or permit to work." 29 U.S.C. § 203(g). *See also* 29 C.F.R. § 500.20(h)(1)

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[5] Our jurisdiction over this appeal from an adverse final decision rests on 28 U.S.C. § 1291 (1988). (The district court entered judgment in both cases pursuant to Fed.R.Civ.P. 54(b), thus permitting this appeal even though the resolution of appellants' claims against Miller is pending.)

Our review of the district court's grant of summary judgment is *de novo*, and we apply the same standards that bound the district court. *RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1459 (11th Cir. 1992).

(1992) (same definition). The MSAWPA concept of "employ" also "includes the *joint employment* principles applicable under the Fair Labor Standards Act." 29 C.F.R. § 500.20(h)(4). The regulations promulgated under MSAWPA define "joint employment" as follows:

> The term *joint employment* means a condition in which a single individual stands in the relation of an employee to two or more persons at the same time. A determination of whether the employment is to be considered joint employment depends upon all the facts in the particular case.

29 C.F.R. § 500.20(h)(4)(i). The regulations also provide the Secretary of Labor (and thus, implicitly, the courts) with a means of determining whether joint employment is present:

> Questions will often arise under the Act as to whether individuals employed by a farm labor contractor are also jointly employed by another person engaged in agriculture (including any person defined in the Act as an agricultural employer or an agricultural association). Such joint employment relationships are common in agriculture and have often been addressed by the Federal courts. See *Hodgson v. Okada*, 472 F.2d 965 [(10th Cir. 1973)], *Hodgson v. Griffin and Brand*, 471 F.2d 235 [(5th Cir. 1973)], *Mitchell v. Hertzke*, 234 F.2d 183 [(10th Cir. 1956)], *United States v. Rosenwasser*, 323 U.S. 360, [65 S.Ct. 295, 89 L.Ed. 301 (1945)], *Rutherford Food Corporation v. McComb*, 331 U.S. 722, 67 S.Ct. 1473 [91 L.Ed. 1772]] [(1947)], *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 [(9th Cir. 1979)], *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297 [(5th Cir. 1975)], and *Usery v. Pilgrim Equipment Company, Inc.*, 527 F.2d 1308 [(5th Cir. 1976)]. In determining whether such a joint employment relation exists the courts have cited the broad definition of *employ* in the Fair Labor Standards Act which *includes to suffer or permit to work*. The factors considered significant by the courts in these cases and to be used as guidance by the Secretary, include, but are not limited to, the following:

> (A) The nature and degree of control of the workers;
> (B) The degree of supervision, direct or indirect, of the work;
> (C) The power to determine the pay rates or the methods of payment of the workers;
> (D) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;
> (E) Preparation of payroll and the payment of wages.

29 C.F.R. § 500.20(h)(4)(ii).[6]

Based on the findings of the district court, to which Miller acceded, it is undisputed that Miller was appellants' employer. As such, Miller was required to fulfill each of the statutory requirements imposed upon employers. MSAWPA simultaneously imposes obligations not only upon direct employers (such as Miller), however, but also upon a broad class of potentially liable persons, including "agricultural employers."[7] *See, e.g.*, 29 U.S.C. §§ 1821(a) & (d) (information and recordkeeping requirements), 1831(c) (recordkeeping), 1822(a) (payment of wages), 1832(a) (payment of wages), and 1841(b)(1) (transportation requirements). Thus, if appellants demonstrate that, through the principle of "joint employment," Long & Scott was their "agricultural employer," Long & Scott would have been obligated along with Miller to fulfill each of the requirements of MSAWPA and FLSA. Therefore, the issue before us, as before the district court, is whether Long & Scott was appellants' joint employer.

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[6] The definition of "joint employment" under FLSA is found in the regulations, 29 C.F.R. § 791.2 (1992).

[7] "The term 'agricultural employer' means any person who owns or operates a farm [or] . . . processing establishment, . . . and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker." 29 U.S.C. § 1802(2). *See also* 29 C.F.R. § 500.20(d) (1992) (same definition).

III

A

To determine whether an employer/employee relationship exists for purposes of federal welfare legislation, we look not to the common law definitions of those terms (for instance, to tests measuring the amount of control an ostensible employer exercised over a putative employee), but rather to the "economic reality" of all the circumstances concerning whether the putative employee is economically dependent upon the alleged employer. *See, e.g., Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S.Ct. 1473, 1477, 91 L.Ed. 1772 (1947) (construing distinction between employee and independent contractor status under FLSA); *Patel v. Wargo*, 803 F.2d 632, 635 (11th Cir. 1986) (analyzing joint employment under FLSA); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237-38 (5th Cir. 1973) (same).[8]

Appellants posit a list of eleven factors to be considered as probative of economic dependency. Five are specifically outlined in the MSAWPA regulations ("the five regulatory factors"): 1) the nature and degree of control of the workers; 2) the degree of supervision, direct or indirect, of the work; 3) the power to determine the pay rates or the methods of payment of the workers; 4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and 5) preparation of payroll and the payment of wages. 29 C.F.R. § 500.20(h)(4)(ii) (1992). The remaining six factors are filtered from various legal decisions: 6) investment in equipment and facilities; 7) the opportunity for profit and loss; 8) permanency and exclusivity of employment; 9) the degree of skill required to perform the job; 10) ownership of property or facilities where work occurred; and 11) performance of a specialty job within the production line integral to the business. *See, e.g., Griffin &*

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[8] Per *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), decisions of the Fifth Circuit adopted prior to close of business on September 30, 1981, are binding precedent upon us.

Brand, 471 F.2d at 237-38; *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979); *Haywood v. Barnes*, 109 F.R.D. 568, 587 (E.D.N.C. 1986).

Appellants emphasize the third factor in arguing their economic dependency on Long & Scott: because Long & Scott effectively controlled the amount of money appellants could earn, appellants assert, they were economically dependent upon Long & Scott. The district court rejected this argument, concluding that appellants' theory of economic dependency was overbroad: even though Long & Scott necessarily determined how much work was available through its choices of how much land to own and which crops to plant, the court determined, that fact alone was insufficient to establish that Long & Scott was appellants' employer.

Long & Scott, however, contends that only the five regulatory factors are probative of the joint employment issue; this framework attempts to shift our inquiry away from economic dependency and toward questions of control. To this end, Long & Scott asserts that the latter six factors relate solely to employment relationships not here in question (for example, whether Miller is an independent contractor of Long & Scott). The district court largely adopted Long & Scott's arguments, limiting its examination to the five regulatory factors.

We believe that neither position is accurate.

B

To begin our analysis, we look first to the regulations adopted by the Secretary of Labor. In the definition of joint employment, § 500.20(h)(4)(ii) specifically states that the factors "to be used as guidance by the Secretary[] include, *but are not limited to*," the five regulatory factors. *Id.* (emphasis added). Further, the fact that the regulation makes reference to cases that considered factors in addition to the five regulatory factors reinforces our view that additional factors may be considered. Thus, we cannot accept Long & Scott's assertion that we should resolve the joint employment issue solely on the basis of the five regulatory factors.

Nonetheless, not all of appellants' eleven factors should be given equal weight and, indeed, several of them are of no value insofar as they apply to factual circumstances not here present. Because the determination of joint employment is a question of law, *Patel v. Wargo*, 803 F.2d 632, 634 (11th Cir. 1986), we analyze *de novo* each of the eleven factors to determine which apply to the present case as well as to discern the direction in which each of the relevant factors points.

C

It is uncontroverted that the five regulatory factors are relevant to this case. What is disputed is whether the first three factors support appellants' contention that Long & Scott was their joint employer.[9] We address each factor in turn.

1. *The Nature and Degree of Control of the Workers.*

Appellants assert that two considerations indicate that Long & Scott's control of the workers confers joint employer status upon Long & Scott. First, appellants contend that Long & Scott made all planting decisions, including which crops to plant, how much to plant, and how to grow the crop (*e.g.*, decisions regarding tilling, fertilization, and irrigation). Second, appellants assert that Frank Scott made all decisions as to which parcels of land to harvest, when in the season to begin the harvests, and how frequently the fields should be harvested (since one parcel of land may be culled several times each season as plants continue to produce salable goods). Because Long & Scott made these decisions, it necessarily determined the amount of produce that could be harvested and, therefore, the exact amount of work available. Thus appellants conclude, they were economically dependent upon Long & Scott's agricultural decisionmaking.

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[9] As we discuss below, appellants acknowledge that the final two regulatory factors do not support a finding of joint employment.

Appellants' argument, however, misses the point. Although, at first glance, the first regulatory factor may appear to encompass abstract notions of control such as these, its focus is more properly limited to specific indicia of control (for example, direct employment decisions such as whom and how many employees to hire, whom to assign to specific tasks, and how to design the employees' management structure). In this case, Long & Scott did not directly control the number of workers hired to do the work; it did not demand that Miller hire (or fire) specific individuals; and, it did not select specific workers to do specific jobs. *Compare Mitchell v. Hertzke*, 234 F.2d 183, 190 (10th Cir. 1956) (finding no joint employment where farmer did not make similar employment decisions) *and Haywood v. Barnes*, 109 F.R.D. 568, 591 (E.D.N.C. 1986) (finding joint control where farmer selected workers for specific tasks and determined the number of workers hired). Rather, Long & Scott hired Miller to pick and pack a specified quantity of vegetables. It was Miller's responsibility to determine the necessary number of workers, to recruit those workers, and to compensate them for their labor. In short, Miller (independent of Long & Scott) exercised absolute, unfettered, and sole control over appellants and their employment.

Appellants allege that, even if Miller controlled hiring and firing, Long & Scott effectively controlled appellants' labor because Long & Scott directed Miller to pick certain fields on specified days.[10] We believe that Long & Scott's agricultural decisions -- decisions which only indirectly affected the number of workers necessary to harvest the land -- cannot be likened to "control" in the FLSA/MSAWPA sense. Long & Scott's business is growing and selling vegetables; Miller's business is providing a sufficient number of laborers to harvest those vegetables. It is not surprising that Long & Scott would (and, despite

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[10] Long & Scott submitted affidavits from Frank Scott and John Miller which asserted that Miller (with limited assistance from Long & Scott) determined which fields to pick. For purposes of this opinion, we will assume that Long & Scott not only possessed the power to determine which fields to pick but also periodically exercised that power.

FLSA/MSAWPA, should be able to) give general instruction to Miller as to which crops to harvest at a particular time. *See Howard v. Malcolm*, 852 F.2d 101, 104 (4th Cir. 1988) (finding no joint employment even though farmer advised contractor which portion of the crop to harvest). *Contra Haywood*, 109 F.R.D. at 589 (concluding assignment of plots to harvest indicative of control and supportive of ultimate finding of joint employment). Control arises, we believe, when the farmer goes beyond general instructions, such as how many acres to pick in a given day, and begins to assign specific tasks, to assign specific workers, or to take an overly active role in the oversight of the work. Such indica of control are not present here. *See Leach v. Johnston*, 812 F.Supp. 1198, 1203, 1207 (M.D.Fla. 1992) (finding farmer to be joint employer when, inter alia, he gave daily assignments to workers through crew leaders).

On the facts of this case, therefore, we find that the first regulatory factor does not support a finding of joint employment. Although Long & Scott, through it planting decisions, indirectly affected appellants' employment, that control was neither direct nor substantial. In sum, ultimate control, as well as the majority of picking decisions, rested in Miller, appellants' direct employer, not in Long & Scott.

2. *The Degree of Supervision, Direct or Indirect, of the Work.*

Appellants link the second regulatory factor, supervision, with the first factor, control, and argue that Long & Scott not only oversaw each day's production (as well as the post-picking task of grading the vegetables), but also issued commands to the workers through Miller.[11] (It is well-settled that supervision is present whether orders are communicated directly to the laborer or indirectly through the contractor. *Griffin & Brand*, 471 F.2d at 238.)

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[11] Although there is evidence that Long & Scott employees occasionally exercised some minimal supervision over a handful of appellants, all appellants acknowledged that Miller and his hired employees served as their direct supervisors and were directly responsible for overseeing their labor.

The record, even when taken in the light most favorable to appellants, establishes that any supervision by Long & Scott was de minimis. For instance, although eleven appellants aver that a Long & Scott employee came out to the field on a regular basis, the affidavits indicate that such employees rarely provided any direction to appellants' work. In addition, appellants place untoward reliance on a few affidavits stating that a Long & Scott employee occasionally gave Miller commands that were, in turn, relayed to an appellant; these examples of infrequent oversight are thus notable because they indicate that Long & Scott, except on rare occasions, left supervision and oversight of appellants entirely to Miller and his crew.

In short, we find that appellants' infrequent assertions of minimal oversight by Long & Scott do not rise to the level of supervision necessary to satisfy this factor. For instance, in *Griffin & Brand*, the putative employer's field supervisors were constantly in the field giving commands to contractors; this contributed to the court's finding of joint employment. 471 F.2d at 238. Similarly, the facts in *Haywood* indicated direct and continuous supervision on the part of the joint employer. 109 F.R.D. at 590. Although the record indicates the presence of some minimal supervision by Long & Scott, appellants have not demonstrated a degree of supervision sufficient to confer joint employment status.

3. *The Power to Determine the Pay Rates or Methods of Payment.*

Appellants rely most heavily on the third regulatory factor, contending that Long & Scott indirectly controlled their rate of pay. Appellant's argument follows the transitive property of geometry: first, Long & Scott controlled the amount Miller received; second, Miller controlled the amount appellants received; therefore, Long & Scott controlled the amount appellants received. This relationship is validated, appellants assert, by Miller's refusal to pay appellants more money unless he received more money from Long & Scott. To summarize, because of Miller's intransigence regarding pay increase, appellants conclude that they were economically dependent upon -- and thus employees of -- Long & Scott.

Unfortunately for appellants, the laws that bind the Euclidian world do not apply with equal force in federal employment law; appellants' leap of logic is unfounded. The record clearly indicates that Miller negotiated the terms of his compensation at arms' length, employing every method possible to win annual increases from Long & Scott. Then, Miller took the revenue he earned from Long & Scott (as well as the revenue he garnered from other employers, who contributed more than half of his income) and independently determined how best to spend it. Miller alone determined what portion of his revenue to expend on labor, housing, and equipment. Most importantly, Miller, not Long & Scott, determined what wages to pay appellants; which workers to pay on a piece-rate basis and which to pay on hourly basis; and when (and if) to increase the workers' wages (either by charging farmers more, decreasing the number laborers, or reducing his expenses or his profit). Long & Scott had no direct or indirect power to set or increase appellants' wages; in fact, even if Long & Scott were to pay Miller more money on his contract (with the intent that Miller use the extra money to increase appellants' wages), Miller would have been free to retain the increase rather than raise appellants' wages; Long & Scott could not influence this decision. The evidence is clear: Miller possessed exclusive control over appellants' compensation, and appellants were economically dependent solely on Miller.

Moreover, a review of other cases establishes that, despite appellants' arguments, the third regulatory factor does not lead to a finding of joint employment in the present case. For instance, in *Haywood*, in which the court found joint employment, the farmer specifically determined the amount of pay and the method of payment. 109 F.R.D. at 591. Similarly, in *Griffin & Brand*, the old Fifth Circuit Court of Appeals, in finding joint employment, noted that the farmer set the workers' pay, determined whether to pay on an hourly or piece-rate basis, and deducted Social Security contributions. 471 F.2d at 238. *Contra*

Leach, 812 F.Supp. at 1203 (finding that flat fee paid to labor contractor indicated control of workers' pay).

4. *The Right, Directly or Indirectly, to Hire, Fire, or Modify the Employment Conditions of the Workers.*

Appellants concede that the fourth regulatory factor favors a finding that no joint employment existed. The evidence in the record demonstrates that Long & Scott never mandated that a particular individual be hired or fired; that Long & Scott never shifted a worker from one pay classification (hourly or piece-rate) to another; that Long & Scott never shifted a worker from one task to another; and, that Long & Scott never dictated the hours that any given employee could work. We agree with both parties and find that this factor, like control, supervision, and pay, does not support a finding of joint employment.

5. *Preparation of Payroll and Payment of Wages.*

Appellants also concede that the fifth regulatory factor does not support a finding of joint employment. Miller was responsible for calculating each of his employees' wages as well as for paying those wages; Long & Scott did not participate at all in this operation.

The district court largely limited its analysis to these five regulatory factors. As we have demonstrated, each factor leads to the conclusion that appellants were economically dependent upon Miller, not upon Long & Scott. If these factors are taken in isolation, the result is inescapable: Miller alone was appellants's employer; no joint employment existed.

D

Appellants contend, however, that six other factors must be taken into consideration; each factor, appellants assert, mandates a finding that Long & Scott was indeed a joint employer. Again, because our review is *de novo*, we will examine independently each factor in resolving two issues: whether the factor is relevant to this case; and, if so, whether it supports a finding of joint employment. We find that only the last two are relevant to our inquiry.

1. *Investment in Equipment and Facilities.*

Appellants derive the first non-regulatory factor from *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979). In that case, farm workers brought suit against Driscoll Strawberry Associates ("DSA") for failure to comply with FLSA; there was no farm labor contractor involved. In defending against the FLSA suit, DSA claimed that the workers were independent contractors, not employees, and that FLSA therefore did not apply. Thus, this factor (as with the next three non-regulatory factors) was not used to determine joint employment status (which was not an issue), but rather to determine whether workers were employees or independent contractors.[12]

We believe this factor not relevant to our decision. It is apparent that appellants indeed were employees, not independent contractors; they have little or no investment in any equipment. If we were to apply this factor, however, it would not indicate who appellants' employer was, as both Miller and Long & Scott made significant investments in equipment and facilities. Indeed, while Long & Scott invested in the mule train (a machine used in the picking of corn), crates, and facilities, Miller invested in trucks, a labor camp (in which many appellants lived), and tools. Thus, while the factor does not exonerate Long & Scott, neither does it demonstrate that appellants were economically dependent upon the farm. We therefore exclude it from our analysis.

---

[12] Significantly, in cases in which the Ninth Circuit Court of Appeals has had to address joint employment issues, it has not adopted the *Real* factors, but instead has limited itself to the five regulatory factors addressed above. *See, e.g., Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1324 (9th Cir. 1991); *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

2. *The Opportunity for Profit and Loss.*

The second non-regulatory factor asks whether, through their own initiative or managerial skill, appellants had the opportunity of realizing profit. As Long & Scott concedes that appellants had no opportunity for profit or loss, appellants contend that appellants were economically dependent upon -- and thus employees of -- Long & Scott.

As with the first non-regulatory factor (investment), this test does not assist our analysis; it, too, is used to determine whether an individual is an independent contractor or an employee. *See, e.g., Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S.Ct. 1473, 1477, 91 L.Ed. 1772 (1947); *Real*, 603 F.2d at 754; *Usery v. Pilgrim Equip. Co., Inc.*, 527 F.2d 1308, 1311 (5th Cir. 1976). Thus, although this factor would indicate that appellants were not independent contractors (a not unsurprising conclusion), it would not assist us in determining whether Long & Scott was appellants' joint employer. We therefore exclude it from our consideration as well.

3. *Permanency and Exclusivity of Employment.*

Appellants argue that the third non-regulatory factor indicates joint employment status for two reasons: first, because Miller worked with Long & Scott for twenty-five years; and second, because, during the harvest season, appellants' employment was permanent and exclusive. *See Haywood*, 109 F.R.D. at 588-89. As to the first argument, the fact that Miller, an independent contractor, worked for Long & Scott for a period of years has no bearing on the question of whether his employees were employed jointly by Long & Scott.

As to the second argument, Long & Scott responds by arguing that many appellants worked for other farms during the years in question and that more than one-half of Miller's income derived from work performed for other farmers. We find, however, that both parties' arguments miss the mark. During the harvest periods at Long & Scott, appellants' work, which largely was exclusive, had the hallmarks of employment. The factor seems to indicate, however, that *Miller* was appellants' *sole* employer, as appellants worked exclusively and permanently for him not only during harvest seasons at Long & Scott, but also during harvest seasons at other farms.

Thus, this factor is irrelevant to our discussion. While it reiterates what we have already concluded -- that appellants were employees, not independent contractors -- it nonetheless fails to demonstrate that Long & Scott was appellants' joint employer. (In fact, contrary to appellant's assertion, it appears to indicate that appellants were employees solely of Miller).

4. *The Degree of Skill Required to Perform the Job.*

As to the fourth non-regulatory factor, appellants assert that, since little or no skill is required to harvest vegetables, appellants were economically dependent upon -- and thus employees of -- Long & Scott. *See Haywood*, 109 F.R.D. at 588; *Real*, 603 F.2d at 754. As with the first three non-regulatory factors, however, this factor is not relevant as it shows that appellants were employees, but not of whom.

5. *Ownership of Facilities where Work Occurred.*

The fifth non-regulatory factor is the first additional factor appellants cite whose relevance is not limited to the employee/ independent contractor distinction. *See Griffin & Brand*, 471 F.2d at 237. *See also McComb*, 331 U.S. at 730, 67 S.Ct. at 1477. It also is the first factor that favors appellants. There is no dispute that appellants worked on land owned by Long & Scott.

6. *Performance of a Specialty Job Integral to the Business.*

Appellants' sixth and final non-regulatory factor also is derived from *Griffin & Brand*, 471 F.2d at 238. *See also, McComb*, 331 U.S. at 730, 67 S.Ct. at 1477. Since appellants performed a line-job integral to the harvesting and production of salable vegetables, we conclude that this factor also supports appellants.

Thus, we find that four of appellants' six non-regulatory factors are irrelevant to this case. And, therein lies a caution:

Courts must closely scrutinize such factors to determine their relevancy to each particular situation. Although many factors may be useful in other FLSA/MSAWPA situations, they are not necessarily useful in all such situations and are of no value to joint employment determinations.

E

In conclusion, although the only two relevant non-regulatory factors favor appellants, we find that the five regulatory factors (all of which strongly indicate that this was not a joint employment situation) demonstrate that appellants were not economically dependent upon -- and thus not employees of -- Long & Scott.

IV

Appellants insist that a determination of joint employment requires the court to sift through eleven separate factors, five found in the regulations under MSAWPA and six derived from other sources.[13] Facially, appellants argument is attractive: the regulation specifically states that our deliberations "are not limited to" the five regulatory factors. 29 C.F.R. § 500.20(h)(4)(ii).

We believe, however, that our inquiry permissibly may be limited to *probative* factors. It is telling that no other court has adopted each of appellants' proposed factors in one case. The reason: not all factors are relevant in every case.

In this case, the district court determined that only the five regulatory factors were relevant to the question at issue: whether Long & Scott was appellants' joint employer. As our analysis above indicates, that determination largely was correct. Four of appellants' six non-regulatory factors indicate that appellants were economically dependent upon someone; they do not, however, tell us upon whom they were dependent and thus are not relevant to our analysis. Only the last two non-regulatory factors,

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[13] If we were to agree with appellants, this case would displace *Haywood* (which had nine factors) as the case with the greatest number of factors.

factors which bear little relative weight, favor appellants. Thus, when we examine these non-regulatory factors in light of the five regulatory factors, each of which demonstrates that appellants were economically dependent solely upon Miller, we conclude that Long & Scott was not appellants' joint employer.

The judgment of the district court therefore is

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

VERGNAUD AIMABLE, et al.,) CASE NO.
Plaintiffs,) 89-96-Civ-Oc-10
)
vs.)
)
LONG AND SCOTT FARMS INC. and)
JOHN MILLER, JR.,)
Defendants.)
)
LECLERC DENEUS et al.,)
Plaintiffs,)
)
vs.)
)
LONG AND SCOTT FARMS, INC. and)
JOHN MILLER, JR.,)
Defendants.)

ORDER

Before the Court are the following motions:[1]

1. The Plaintiffs' motion (Doc. 105) for partial summary judgment. The Defendants have responded (Docs. 122 & 128).

2. Long & Scott Farms, Inc.'s (Long & Scott) motion (Doc. 107) for summary judgment. The Plaintiffs have responded (Doc. 126).

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[1] These two cases involve the same issues of fact and law and were consolidated pursuant to M.D.Fla. Rule 1.04(b) by Order (Doc. 117) entered 3 January 1991. The motions, supporting memoranda, and responses thereto that are before the Court are identical in each case. The docket numbers used in this Order are those of 89-96-Civ-Oc-10.

I have determined that there is no genuine issue as to any material fact so that summary judgment is appropriate under Rule 56, Fed.R.Civ.P. While the parties debate the inferences and conclusions to be drawn from the facts, the facts themselves are clearly established.

Defendant Long & Scott is a corporate farmer. During the years 1985-1990, Long & Scott contracted with Miller to provide farm labor to pick, grade and pack its vegetables and deliver them to its sales cooler. Miller, a farm labor contractor, recruited, hired, employed, supervised, transported and furnished hundreds of migrant farm workers to Long & Scott. Additionally, Miller housed many of the workers in camps which he owned.

Miller and Long & Scott negotiated, at arms length, contracts that required Long & Scott to pay Miller piece rates based upon the quantity of saleable vegetables delivered to Long & Scott's cooler. Miller in turn paid his workers wages based upon lower rates. Miller kept the difference to pay overhead expenses and as profit. It is undisputed that the difference amounted to about fifty percent of what Long & Scott paid Miller, or approximately $500,000.00 per year.

Long & Scott provided Miller the location of the fields, a planting schedule, and information on the volume of vegetables needed at the cooler at a given time. Miller, with input from Long & Scott, made the ultimate decision on which field to pick and how often to pick it. He also decided what size crew to use and when they would begin and end the working day. Long & Scott constructed specialized equipment which was used in the fields. Accordingly, Miller did not use the equipment that he owned. However, he did own and use a fleet of vehicles for transporting workers to and from the fields. He also operated a repair facility where he maintained his vehicles.

Long & Scott provided Miller with one employee, Petty, who drove the "mule train" which was used to harvest corn. Miller supervised Petty. Otherwise, there were no Long & Scott employees in the fields when Miller was picking them, except on those occasions when messages were sent to Miller. Miller, or his subordinates, supervised his employees. He decided who to hire and who to fire. He disciplined his own workers. Miller prepared all of the workers' payroll records. He made deductions for taxes and he paid the workers. Long & Scott played no role in these areas.

About 40 of the 223 Plaintiffs state in answers to interrogatories that someone from the "company" occasionally came out to the fields and relayed information to Miller or his subordinates. Less than twelve state that they were "yelled at" after the company man left. These few statements are insufficient to create a genuine issue of fact concerning the supervision of the workers.

The amended complaint (Doc. 36) contains numerous counts against both Defendants for alleged violations of the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA), 29 U.S.C. §§ 1801, et. seq., and the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201, et. seq. The Plaintiffs also allege that Defendant Miller failed to pay Social Security and Unemployment Compensation taxes in violation of the Federal Insurance Contributions Act (FICA) 26 U.S.C. §§ 3101, et. seq., and the Federal Unemployment Tax Act (FUTA), 26 U.S.C. §§ 3301, et. seq.

Summary judgment is appropriate only when the Court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), F. R. Civ. P. In making this determination, the Court must view all of the evidence in a light most favorable to the non-moving party." *Samples on Behalf of Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). The moving party has the initial burden of establishing the absence of a genuine issue of fact. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986). Next, the "non-moving party . . . bears the burden of coming forward with sufficient evidence of every element that he or she must prove." *Rollins v. Techsouth, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987). To that end, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, supra at 2553.

In order for Long & Scott to be liable under either MSAWPA or FLSA, it must have been the Plaintiffs' "employer" as that term has been construed under FLSA.[2] The determination of whether Long & Scott was the Plaintiffs' employer is ultimately a legal one, to be supported by subsidiary factual findings. *Patel v. Wargo*, 803 F.2d 632, 634 (11th Cir. 1986).

The Plaintiffs contend that Miller and Long & Scott were their joint employers. Miller does not dispute that he was an employer as construed under the FLSA; Long & Scott does. The Secretary of Labor has determined that the following factors are significant in determining whether a joint employment relationship exists:

> (A) The nature and degree of control of the workers;
> (B) The degree of supervision, direct or indirect, of the work;
> (C) The power to determine the pay rates or the methods of payment of the workers;
> (D) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;
> (E) Preparation of payroll and the payment of wages.

29 C.F.R. § 500.20(h)(4)(ii).

Applying the Factors

(A) & (B) Long & Scott had no control over the employees. It played no role in the hiring, firing or supervising of the employees. The number of Plaintiffs who stated in interrogatories that men from the "company" occasionally came out to the fields does not raise a genuine issue of material fact on the issue of supervision. Miller ultimately decided which fields the workers picked, how many would pick there, for how long and how often. Miller prepared the workers' payrolls, deducted taxes and paid the workers. Miller also housed and transported many of the workers. On the other hand, Long & Scott provided almost all of the tools and equipment used by the workers in the field.

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[2] MSAWPA incorporates the definition of "employ" found in FLSA. 29 U.S.C. § 1802(5).

(C) Miller had the power to determine the pay rates and the method of payment of the workers. It is undisputed that his payroll was approximately one half of his gross revenue from Long & Scott. He could have paid his workers more or less and could have used a different method of payment if he chose to. Long & Scott played no role in this area. If it had paid Miller more money or paid him by a method other than piece rate, there is no indication that Miller would have paid his employees any differently.

(D) Miller alone had the right to hire, fire, or modify the employment conditions of the workers.

(E) Miller alone prepared the worker's payroll and paid the workers.

After applying these relevant factors it is clear that Long & Scott was not the workers' joint employer. The Plaintiffs cite cases which involve the issue of whether a purported farm labor contractor was himself an independent contractor or an employee of the farmer. Here it is undisputed that Miller was an independent contractor and not an employee of Long & Scott's.

The Plaintiffs also argue that the ultimate test regarding the existence of a joint employer relationship is one of "economic reality" and the degree of "dependency" of the workers upon the farmer. But the workers are always dependent on the farmer in an economic sense, and if the workers here were Long & Scott's employees, then it is fair to say that all farm laborers recruited by farm labor contractors would be employees of the farmers on whose farm they work. If Congress had intended that result in enacting the new statute in 1982, it could have said so; but it did not, opting instead to borrow the more limited reach of the joint employer jurisprudence under the FLSA.

Long & Scott's motion for summary judgment is due to be granted on the employment issue.

The Plaintiffs also move the Court to find that Miller was: 1) their employer for purposes of their FLSA, FICA, FUTA claims, and 2) a farm labor contractor and an owner/operator of housing for purposes of their MSAWPA claims. Miller does not dispute that he was any of these things in general. However, in his affidavit he states that several of the Plaintiffs never worked for him, and accordingly, there is an issue of material fact as to whether Miller occupied any of those relationships with regard to those Plaintiffs. Miller does not dispute the application of the statutes with regard to the remainder of the Plaintiffs. Accordingly, they apply to Miller for purposes of those Plaintiffs' claims.

Long & Scott also moves for summary judgment with respect to the claims made pursuant to 29 U.S.C. § 1842. The Plaintiffs concede that Long & Scott's motion is due to be granted in this regard.

Upon due consideration:

1. The Plaintiffs' motion (Doc. 105) for partial summary judgment is GRANTED, to the extent that the Court finds Miller to have been the employer of the Plaintiffs which he does not dispute having employed. The motion is otherwise DENIED. A list of Plaintiffs, broken down by those that Miller does and does not dispute having employed, is attached as Appendix A.

2. Long & Scott's motion (Doc. 107) for summary judgment is GRANTED in its entirety. Further, pursuant to Rule 54(b), Fed.R.Civ.P., there is no reason for delay in the entry of final judgment and the Clerk is therefore directed to enter judgment in favor of Long & Scott Farms, Inc., and against the Plaintiffs, with costs to be assessed according to law.

IT IS SO ORDERED.

DONE and ORDERED at Jacksonville, Florida, this 30th day of June, 1992.

/s/ Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE

MOTION FILED
SEP 1 1994

No. 94-264 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VERGNAUD AIMABLE, *et al.*,
Petitioners,
v.
LONG & SCOTT FARMS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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Motion for Leave To File Brief Amici Curiae And Brief Amici Curiae of United Farm Workers of America, AFL-CIO; Farm Labor Organizing Committee, AFL-CIO; Pineros y Campesinos Unidos del Noroeste, Inc.; International Brotherhood of Teamsters, AFL-CIO; General Teamsters, Warehousemen and Helpers Union, Local 890; Union de Trabajadores Agricolas de la Frontera; Farmworkers Association of Florida, Inc.; Comite de Apoyo a los Trabajadores Agricolas, Inc.; National Council of La Raza; Mexican American Legal Defense and Educational Fund; Migrant Clinicians Network; Association of Farmworker Opportunity Programs In Support of the Petition

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SHELLEY DAVIS
(Counsel of Record)
BRUCE GOLDSTEIN
FARMWORKER JUSTICE FUND, INC.
2001 S Street, N.W.
Suite 210
Washington, D.C. 20009
(202) 462-8192

Counsel for Amici Curiae

40 pp

IN THE

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On Petition for a Writ of Certiorari to the United States Courts of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE FOR UNITED FARM WORKERS OF AMERICA, AFL-CIO, *et al.* IN SUPPORT OF THE PETITION

Pursuant to Rule 36.3 of this Court, the movants, who are described below, request leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Counsel for the petitioners have consented to the filing of this brief. This motion is made necessary because counsel for the respondent has not granted its consent.

The proposed *amici* are organizations that represent and provide a variety of services to tens of thousands of migrant and seasonal farmworkers across the United States. The United Farm Workers of America, AFL-CIO; Farm Labor Organizing Committee, AFL-CIO; Pineros y Campesinos Unidos del

Noroeste, Inc. (Northwest Treeplanters and Farmworkers United); International Brotherhood of Teamsters, AFL-CIO; General Teamsters, Warehousemen and Helpers Union, Local 890; and Union de Trabajadores Agricolas de la Frontera (Border Agricultural Workers Union) are labor unions that engage in labor organizing, collective bargaining, and efforts to enforce legal protections for farmworkers. They represent farmworkers in California, Florida, Ohio, Oregon, Texas, Washington, and other states.

Amici Farmworker Association of Florida, Inc. and Comite de Apoyo a los Trabajadores Agricolas, Inc. (Farmworkers Support Committee) are community-based membership organizations which seek to protect migrant workers from abuse and discrimination and provide a variety of services to their farmworker members in Florida, New Jersey, Pennsylvania, Puerto Rico, and elsewhere.

The National Council of La Raza and the Mexican-American Legal Defense and Educational Fund are national advocacy organizations seeking to protect the rights of people of Hispanic descent, including farmworkers. The Association of Farmworker Opportunity Programs is a national association of agencies that provide farmworkers with employment opportunities, training and supportive services. Finally, the Migrant Clinicians Network is a national organization of health care providers who serve farmworkers and their families. In their work, all of the *amici* seek to preserve the rights of farmworkers under, *inter alia*, the Fair Labor Standards Act ("FLSA") and the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA").

The opinion in *Aimable v. Long and Scott Farms, Inc.*, 20 F.3d 434 (11th Cir. 1994), threatens to eviscerate farmworkers' rights to the minimum wage and other basic protections guaranteed by the FLSA and the AWPA. Congress explicitly recognized that growers frequently seek to shift responsibility for such minimum protections to farm labor contractors, or "crewleaders," who commonly work as labor intermediaries in agriculture and who often are unwilling or unable to meet their legal obligations under these statutes. To prevent such an evasion of these laws, which would place competitive pressure on law-abiding growers to do the same, Congress imposed joint responsibility for compliance with the FLSA and the AWPA on all entities on whom a worker is economically dependent.

The proposed *amici* can provide the Court with valuable assistance in determining whether to grant the petition for *certiorari*. These organizations have worked for many years with many thousands of farmworkers on the issues directly involved here. The farmworkers represented and served by these organizations are the very persons whom these statutes protect. This case also directly affects the ability of farmworker organizations, including the proposed *amici*, to effectively enforce these laws. Moreover, many of these organizations previously have submitted *amicus* briefs to this Court on other issues affecting farmworkers. *See, e.g.*, *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990).

Based on their long and extensive experience in agricultural labor relations, the proposed *amici* believe that if the appellate court's decision in *Aimable* is allowed to stand, and is followed by other courts, the effects will be devastating. The economic relationships among the petitioners, the crewleader and the respondent grower in this case are common in agriculture. If these 206 petitioners are relegated to securing relief only from an insolvent crewleader, then tens of thousands of other farmworkers will suffer the same fate. It is vitally important to the *amici* and to farmworkers throughout the nation that the Eleventh Circuit decision be reversed.

Accordingly, the movants seek to submit the attached *amici curiae* brief in support of the petition for writ of certiorari.

Respectfully submitted,

SHELLEY DAVIS
(Counsel of Record)
BRUCE GOLDSTEIN
FARMWORKER JUSTICE
FUND, INC.
2001 S Street, N.W.
Suite 210
Washington, D.C. 20009
(202) 462-8192

September 7, 1994

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI CURIAE 1

ARGUMENT 2

INTRODUCTION 2

I. GROWERS COMMONLY HIRE CREWLEADERS WHO VIOLATE FARMWORKERS' RIGHTS TO THE MINIMUM WAGE AND OTHER BASIC LABOR PROTECTIONS 4

- A. A Demographic Profile of Farmworkers 4
- B. Crewleaders are Commonly Used to Recruit and Supervise Migrant and Seasonal Farmworkers 6
- C. The Abuses of the Crewleader System 9

II. CONGRESS ADOPTED A BROAD JOINT EMPLOYER DOCTRINE TO PROTECT FARMWORKERS FROM THE ABUSES ASSOCIATED WITH CREWLEADERS 13

- A. In Enacting FLSA and AWPA, Congress Specifically Targeted Abuses Associated With The Use Of Farm Labor Contractors 13
  - 1. The Definition of Employer Under the FLSA 13
  - 2. The Farm Labor Contractors Registration Act of 1963 14

TABLE OF CONTENTS

Page

3. The Fair Labor Standards Amendments of 1966 15

4. The 1974 Amendments to FLCRA 16

5. The Migrant and Seasonal Agricultural Worker Protection Act of 1983 17

B. Congress Sought To Eliminate The Denial Of Minimum Wage And Other Labor Protections Associated With Labor Contractors By Adopting A Broadly Applicable Joint Employer Doctrine 18

III. THE ELEVENTH CIRCUIT DECISION CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND OTHER CIRCUIT COURTS AND DEVASTATES FARMWORKERS' ABILITY TO SECURE MINIMUM LABOR PROTECTIONS IN CIRCUMSTANCES THAT TYPICALLY ARISE IN AMERICAN AGRICULTURE . . . 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Aimable v. Long and Scott Farms, Inc.,
20 F.3d 434 (11th Cir. 1994) 2, 20, 21, 23

Antunez v. G & C Farms, Inc.,
126 Lab. Cas. (CCH) ¶ 33,015 (D.N.M. 1993) 11, 12

Bartels v. Birmingham, 332 U.S. 126 (1947) 21

Beliz v. W.H. McLeod & Sons Packing Co.,
765 F.2d 1317 (5th Cir. 1985) 11, 12, 23

Bresgal v. Brock, 637 F. Supp. 271 (D. Or. 1985),
aff'd and amended, 843 F.2d 1163 (9th Cir. 1987) . . . 11, 12

Brock v. Elsberry, 663 F. Supp. 359
(M.D. Fla. 1987) 12

Brock v. John Miller, Jr., No. 86-606-CIV-ORL-18
(M.D. Fla. May 20, 1987) 12

Bueno v. Mattner, 633 F. Supp. 1446 (W.D. Mich. 1986),
aff'd, 829 F.2d 1380 (6th Cir. 1987) 10, 11

Calderon v. Witvoet,
999 F.2d 1101 (7th Cir. 1993) 12

Castillo v. Givens, 704 F.2d 181
(5th Cir. 1983), *cert. denied*, 464 U.S. 850 (1983) . . . 11, 23

Certilus v. Peeples, 101 Lab. Cas.
(CCH) ¶ 34,587 (M.D. Fla. 1984) 12

TABLE OF AUTHORITIES (Cont'd.)

Page

Cruz v. Val-A-Da, Inc.,
127 Lab. Cas. (CCH) ¶ 33,072 (N.D. Ohio 1993) 10

D.H. Phillips, Inc. v. Walling,
324 U.S. 490 (1945) 13

Davis v. Williams,
622 F. Supp. 386 (W.D.N.Y. 1985) 10

Donovan v. Mehlenbacher,
652 F.2d 228 (2d Cir. 1981) 12

Dunlop v. John Miller, Jr.,
No. 75-484 (E.D. Va. Sept. 12, 1975) 12

Escobar v. Baker, 814 F. Supp. 1491
(W.D. Wash. 1993) 11

Fahs v. Tree-Gold Co-op Growers, Inc.,
166 F.2d 40 (5th Cir. 1948) 23

Goldberg v. Whitaker House Cooperative, Inc.,
366 U.S. 28 (1961) 21

Hodgson v. Griffin & Brand Of McAllen, Inc.,
471 F.2d 235 (5th Cir. 1973) 23

Hodgson v. Okada, 472 F.2d 965
(10th Cir. 1973) 23

In re: John Miller, Jr., Rudeen Quince Miller, Debtors,
No. 94-2166-8G3 (U.S. Bankr. Ct., M.D. Fla.) 13

TABLE OF AUTHORITIES (Cont'd.)

Page

Leach v. Johnston, 812 F. Supp. 1198
(M.D. Fla. 1992) 10

Lehigh Valley Coal Co. v. Yensavage,
218 F. 547 (2d Cir. 1914) 20

Maldonado v. Lucca, 636 F. Supp. 621
(D. N.J. 1986) 10

Martinez v. Shinn, 992 F.2d 997
(9th Cir. 1993) 11

Matter of Hylton Hedman,
Lab. L. Rep. (CCH) ¶ 32,296 (Feb. 25, 1994) 12

Nationwide Mutual Insurance v. Darden,
112 S. Ct. 1344 (1992) 19

People on Inf. of Price v. Sheffield Farms-Slawson-Decker
Co., 225 N.Y. 25, 121 N.E. 474 (1918) 19

Real v. Driscoll Strawberry Associates, Inc.,
603 F.2d 748 (9th Cir. 1979) 23

Roland Electrical Co. v. Walling,
326 U.S. 657 (1946) 18

Rutherford Food Corp. v. McComb,
331 U.S. 722 (1947) . . . . *passim*

Sanchez v. Overmyer, 845 F. Supp. 1183
(N.D. Ohio 1993) 11, 12

TABLE OF AUTHORITIES (Cont'd.)

Page

Secretary of Labor v. Lauritzen,
835 F.2d 1529 (7th Cir. 1987) 23

United States Department of Labor v. Anthony,
Lab. L. Rep. (CCH) ¶ 32,293 (Dec. 20, 1993) 11

United States v. Darby, 312 U.S. 100 (1941) 19

United States v. Rosenwasser,
323 U.S. 360 (1945) 14

Washington v. Miller, No. 82-343-ORL-CIV-EK
(M.D. Fla. April 26, 1983), *aff'd*, 721 F.2d 797
(11th Cir. 1983) 12

Williams v. Tri-County Growers, Inc.,
747 F.2d 121 (3d Cir. 1984) 10, 11

STATUTES

29 U.S.C. § 202(a)(3) 19

Migrant and Seasonal Agricultural Worker Protection Act,
Pub. L. No. 97-470, 96 Stat. 2584 (1983) (codified at 29
U.S.C. §§ 1801-72) 17

  29 U.S.C. § 1802(2) 17

  29 U.S.C. § 1802(5) 17

The Farm Labor Contractor Registration Act, Pub. L. No.
88-582, 78 Stat. 920 (1963) 14

TABLE OF AUTHORITIES (Cont'd.)

Page

The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 304, 100 Stat. 3359 (1986) . . 5

CONGRESSIONAL HISTORY

81 Cong. Rec. 7657 (1937) 14

110 Cong. Rec. 19,896 (1964) 14

110 Cong. Rec. 19,894 (1964) 14

110 Cong. Rec. 19,986 (1964) 14

112 Cong. Rec. 11376 (1966) 15

H.R. Rep. No. 885, 97th Cong. 2d. Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547 . . . . *passim*

H.R. Rep. No. 1493, 93d Cong., 2d Sess. 6 (1974) 16

Hearing on the Migrant and Seasonal Agricultural Worker Protection Act: Hearing on H.R. 7102 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 97th Cong., 2nd Sess. (1982) 5, 16

Migratory Labor Bills: Hearings on S. 521 and Other Bills Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. (1963) 14

TABLE OF AUTHORITIES (Cont'd.)

Page

Reauthorization of Expiring Federal Elementary and Secondary Education Programs, Chapter 1 of the Education Consolidation and Improvement Act: Hearings on H.R. 5 & H.R. 950 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor, 100th Cong., 1st Session (1987) 5

S. Rep. No. 202, 88th Cong., 1st Sess. (1963) 15

S. Rep. No. 1206, 93d Cong. 2d Sess. (1974) 16

S. Rep. No. 1487, 89th Cong. 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 3012 15

MISCELLANEOUS

American Civil Liberties Union, *The Hands That Feed Us: Undocumented Farmworkers in Florida* (1986) 7

E. Dement, *Out of Sight, Out of Mind: An Update on Migrant Farmworker Issues in Today's Agricultural Market,* National Governor's Association Working Paper (1985) 5, 6

M. Edid, *Farm Labor Organizing: Trends & Prospects* (1994) 6

D. Griffith, *Seasonal Agricultural Labor and Recruitment Methods in the Eastern United States: An Overview With Special Attention to the Northeast* (1991) 7

R. Goldfarb, *Migrant Farm Workers: A Caste of Despair* (1981) 4, 5, 8

TABLE OF AUTHORITIES (Cont'd.)

Page

M. Linder, *Migrant Workers And Minimum Wage: Regulating the Exploitation of Agricultural Labor in the United States* (1992) 9

Office of Program Economics, United States Department of Labor, *United States Farmworkers in the Post-IRCA Period, Based on Data from the National Agricultural Workers Survey* (1993) 6

P. Martin, *California's Farm Labor Market*, Univ. of Cal. Issues Paper No. 87-1 (1987) 7

Philip L. Martin, *Seasonal Workers Background and Issues* (Nat'l. Comm'n. for Employment Policy, Research Rept. RR-85-04, 1985) 10

Leo C. Polopolus & Robert D. Emerson, *Entrepreneurship, Sanctions, and Labor Contracting*, Southern Journal of Agricultural Economics 23 (1991) . . . 10

Report of the Commission on Agricultural Workers (1992) 5, 6, 8, 10

Roland, *Abuse follows migrant workers: Haitians say crewleader didn't pay them, then had them beaten up*, Palm Beach Review, Dec. 13 1991 at A14 13

Symposium: Legal Problems of Agricultural Labor, U.C. Davis L. Rev. 1 (1970) 8

United States Dep't of Labor, *Migrant Farmworkers: Pursuing Security in an Unstable Labor Market*, Research Report No. 5 (1994) 6

TABLE OF AUTHORITIES (Cont'd.)

Page

United States Dep't of Labor, Wage & Hour Division, MSPA Registration Statistics (Aug. 26, 1994) 8

United States General Accounting Office, *Hired Farmworkers: Health at Risk* (GAO/HRD-92-46) (1992) . . 11

United States General Accounting Office, *Illegal Aliens: Influence of Illegal Workers on Wages and Working Conditions of Legal Workers* (GAO/PEMO-88-13BR) (1988) 9

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-264

VERGNAUD AIMABLE, *et al.*,
Petitioners,
v.

LONG & SCOTT FARMS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Courts of Appeals for the Eleventh Circuit

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BRIEF AMICI CURIAE FOR UNITED FARM WORKERS OF AMERICA, AFL-CIO, *et al.* IN SUPPORT OF THE PETITION

INTEREST OF THE AMICI CURIAE

The *amici*, on behalf of themselves and the tens of thousands of farmworkers they represent and serve, respectfully urge the Court to grant a writ of certiorari in this matter.

Amici United Farm Workers of America, AFL-CIO; Farm Labor Organizing Committee, AFL-CIO; Pineros y Campesinos Unidos del Noroeste, Inc. (Northwest Treeplanters and Farmworkers United); International Brotherhood of Teamsters, AFL-CIO; General Teamsters, Warehousemen and Helpers Union, Local 890; and Union de Trabajadores Agricolas de la

Frontera (Border Agricultural Workers Union) are labor unions that engage in labor organizing, collective bargaining and efforts to enforce legal protections for farmworkers. They represent farmworkers in California, Florida, Ohio, Oregon, Texas, Washington and other states.

Amici Farmworker Association of Florida, Inc. and Comite de Apoyo a los Trabajadores Agricolas, Inc. (Farmworkers Support Committee) are community-based membership organizations which seek to protect migrant workers from abuse and discrimination and provide a variety of services to their farmworker members in Florida, New Jersey, Pennsylvania, Puerto Rico and elsewhere.

Amici National Council of La Raza and the Mexican-American Legal Defense and Educational Fund are national advocacy organizations seeking to protect the rights of people of Hispanic descent, including farmworkers. *Amicus* Association of Farmworker Opportunity Programs is a national association of agencies that provide farmworkers with employment opportunities, training and supportive services. Finally, *amicus* Migrant Clinicians Network is a national organization of health care providers who serve farmworkers and their families. In their work, all of the *amici* seek to preserve the rights of farmworkers under, *inter alia*, the Fair Labor Standards Act ("FLSA") and the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA").

ARGUMENT

INTRODUCTION

The opinion in *Aimable v. Long and Scott Farms, Inc.*, 20 F.3d 434 (11th Cir. 1994), threatens to eviscerate farmworkers' rights to the minimum wage and other basic protections guaranteed by the FLSA and the AWPA. Two of Congress' objectives in enacting the FLSA and the AWPA were to eliminate the detrimental effect of substandard wages and working conditions on workers and society and to prohibit any company from gaining a competitive advantage by paying meager wages or providing substandard working conditions. Congress explicitly recognized that farm labor contractors or "crewleaders," who commonly work as labor intermediaries in agriculture, are often unwilling or unable to comply with minimum labor protections. It also noted that growers have used crewleaders to undercut labor standards and gain a competitive advantage. Congress addressed these abuses by imposing joint liability on all entities on whom a worker is economically dependent.

As a practical matter, the protections of the FLSA and the AWPA are only meaningful if the farmworker is found to be an employee of the grower, not just the crewleader. The ability of a farmworker to enforce these statutes against the grower depends entirely on the scope of the joint employer doctrine.

The economic relationships among the petitioners, the crewleader and the respondent grower in this case are common in agriculture. The grower here had a substantial investment in its farming operation, controlled every major aspect of the production and marketing process and simply hired an unskilled farm labor contractor to recruit and supervise the day-to-day work of the unskilled farmworkers who harvested and packed its vegetables. The notorious crewleader involved in this action, John Miller, Jr., had no particular expertise, provided no significant harvesting or packing equipment and was actively supervised by the corporate grower's representatives. In such circumstances, the farmworkers are economically dependent both on their labor contractor and the respondent corporation.

Aimable drastically curtails the joint employer doctrine by holding irrelevant or inconsequential several criteria which this Court and other circuit courts have recognized to be central to a determination of joint employer status. In its narrow view these criteria would be relevant only to determine whether workers are independent contractors rather than employees, but not to determine whether the workers are jointly employed by a grower and a crewleader. The Eleventh Circuit's contrary conclusion is based on a misconception of the joint employer doctrine and conflicts with the decisions of this Court and other circuit courts.

Moreover, the harms produced by the Eleventh Circuit's decision are precisely those which Congress enacted the AWPA and the FLSA to avoid. By relegating farmworkers to a remedy solely against their crewleader, the Eleventh Circuit has effectively denied these workers any real remedy. Crewleaders frequently lack any substantial resources to pay the judgments against them. Indeed, the petitioners' crewleader, John Miller, Jr., is currently in bankruptcy proceedings. In addition, law-abiding growers who ensure that their farmworkers receive the minimum wage and other protections guaranteed by law will suffer a competitive disadvantage vis-a-vis other growers who are willing to profit from the loophole created by the Eleventh Circuit decision and rely on unscrupulous crewleaders to reduce their labor costs. The losers are the farmworkers for whom the minimum wage and other statutory protections of the AWPA and the FLSA are crucial bulwarks against impoverishment. It is vitally important to the *amici* and their farmworker members throughout the nation that the Eleventh Circuit decision be reversed.

I. GROWERS COMMONLY HIRE CREWLEADERS WHO VIOLATE FARMWORKERS' RIGHTS TO THE MINIMUM WAGE AND OTHER BASIC LABOR PROTECTIONS

A. A Demographic Profile of Farmworkers

Migrant and seasonal farmworkers are the poorest of the working poor, laboring long hours for low pay in difficult conditions. They "remain today, as in the past, the most abused of all workers in the United States." H.R. Rep. No. 885, 97th Cong. 2d. Sess. 2, *reprinted in* 1982 U.S.C.C.A.N. 4547, 4548 ("H.R. Rep. No. 885"). Moreover, "(a)s a group, they are . . . without public voice or power to make their way or improve their lot." R. Goldfarb, *Migrant Farm Workers: A Caste of Despair* 4 (1981) ("*Caste of Despair*").

Approximately 2.5 million men, women and children[1] perform paid agricultural labor. *Report of the Commission on Agricultural Workers* at 1 (1992) ("Commission Report").[2] The majority of farmworkers reside permanently in Florida, Puerto Rico, Texas and California. The traditional migrant streams, which followed the harvest up the east coast, through the midwest and along the west coast, have eroded. *See* E. Dement, *Out of Sight, Out of Mind: An Update on Migrant Farmworker Issues in Today's Agricultural Labor Market*, (National Governor's Association Working Paper, 1985) ("*Out of Sight, Out of Mind*"). Now "migrants from Florida . . . [can] be found in Washington State[;] . . . Puerto Rican and Florida workers . . . [can be] found regularly in California, while California migrants . . . [are] found in New Jersey. . . ." *Id.* at 21. In addition, many farmworkers live year round in the areas of their employment.

"Since the mid-1980's, the living and working conditions of hired farmworkers have changed, but seldom improved. Nominal wages have increased, . . . , but . . . real wages . . . [have]

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[1] Because of the low wages farmworkers earn, migrant children as young as eight years old often work alongside their parents in the fields. *A Caste of Despair* at 158. *See Hearing on the Migrant and Seasonal Agricultural Worker Protection Act Before the Subcomm. on Labor Standards of the Comm. on Education and Labor*, 97th Cong., 2nd Sess. 22 (1982) (reporters testified that they saw children working in every field and grove they visited in Florida); *Reauthorization of Expiring Federal Elementary and Secondary Education Programs, Chapter 1 of the Education Consolidation and Improvement Act: Hearings on H.R. 5 & H.R. 950 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 100th Cong., 1st Sess. 223 (1987) (testimony of John D. Perry, Senior Project Consultant, Interstate Migrant Education Council).

[2] The Commission on Agricultural Workers was authorized by Section 304 of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) ("IRCA"). Congress instructed the Commission to address issues concerning the effects of immigration reform on the agricultural labor market.

fall[en]." Commission Report at xix. On average, migrant farmworkers earn approximately $5,000 per year and work only an average of twenty-five weeks per year in agriculture. United States Department of Labor, *Migrant Farmworkers: Pursuing Security in an Unstable Labor Market* 31, Research Rept. No. 5 (1994). "The lack of full-time and year-round work combined with low wages relegates two-thirds (63%) of migrant farmworkers to living below the poverty line." *Id.* Their employment is also extremely vulnerable to the uncertainties posed by drought, crop disease and insects, equipment failure, poor market conditions or an over-supply of labor. *See, e.g., Out of Sight, Out of Mind* at 25. When such a disaster occurs farmworkers "can find them-selves suddenly out of work, without any form of income, and in completely unfamiliar surroundings where emergency relief may be almost unobtainable." *Id.*

"[F]armworkers . . . remain a marginal group in American society . . . . Limited educational attainment, lack of transferable job skills, language, and cultural factors all inhibit their assimilation into the mainstream." M. Edid, *Farm Labor Organizing: Trends & Prospects* 11 (1994) ("Edid"). As the Commission on Agricultural Workers noted, large labor surpluses, the increasing use of farm labor contractors and farmworkers' "essential[] powerless[ness] . . . in relation to agricultural employers" all hinder their efforts to improve their wages and working conditions.

B. Crewleaders are Commonly Used to Recruit and Supervise Migrant and Seasonal Farmworkers

Aimable involves a grower's use of a farm labor contractor or "crewleader." Crewleaders are "the middlemen who recruit and manage labor . . . ." Edid at 11; H.R. Rept. No. 885 at 2 ("The focus of the 1963 Act . . . was clearly the crew leader, a middleman who recruited, transported and supervised migrant and seasonal workers . . .").

The crewleader's role as recruiter is very common across the United States. Approximately 28% of all harvest workers are directly hired by farm labor contractors. Office of Program

Economics, United States Department of Labor, *United States Farmworkers in the Post-IRCA Period, Based on Data from the National Agricultural Workers Survey* 59 (1993) ("NAWS Study").[3] In California a recent study f[illegible] that one-fifth of the state's farms hired workers indirectly through farm labor contractors. P. Martin, *California's Farm Labor Market* 19, Univ. of Cal. Issues Paper No. 87-1 (1987). Another study reported that the "most common method used by growers throughout the eastern United States to meet their labor needs is the use of farm labor contractors (FLCs)." D. Griffith, *Seasonal Agricultural Labor and Recruitment Methods in the Eastern United States: An Overview With Special Attention to the Northeast* (1991), Commission Report, Appendix II at 1041 (hereafter "Griffith").

Growers also frequently assign crewleaders to supervise their farmworkers. *See* Commission Report at 46-47. A recent study of Florida's farm labor market found:

> Many of the problems of farmworker in Florida can be attributed to the use of crew leaders to hire and manage farmworkers. . . . With the exception of a few large farms . . . , crew leaders are the only "bosses" that most farmworkers will ever deal with.

American Civil Liberties Union, *The Hands That Feed Us: Undocumented Farmworkers in Florida* 47-48 (1986).

The crewleader here, John Miller, Jr., performed tasks in addition to recruitment and supervision, but this, too, is common. "Traditionally, FLCs have fulfilled a variety of functions in addition to their principal functions of supplying and supervising labor." Griffith at 1041. "In addition to providing jobs and serving as supervisors, contractors often involve themselves further with workers' lives by supplying or helping them arrange for housing, transportation, meals, loans and a variety of other services." Commission Report at 46-47. As one commentator noted:

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[3] The NAWS Study, a national survey of field workers in perishable crops, was commissioned by the United States Department of Labor as part of its response to the 1986 amendments to the immigration laws.

> Everything of importance to the farmworker is affected by the labor contractor - how he gets a job, terms of his employment, his transportation to and from work, his housing and that of his family, medical services - the whole gamut of his relationship with the ultimate employer, the grower.

A Caste of Despair at 26. *See Symposium: Legal Problems of Agricultural Labor*, 2 U.C. Davis L. Rev. 1, 39-53 (1970).

Growers' utilization of farm labor contractors has been increasing in recent years. Commission Report at 46. Currently, there are 11,432 registered farm labor contractors in the United States, who employ 532,901 farmworkers. United States Department of Labor, Wage & Hour Division, MSPA Registration Statistics (Aug. 26, 1994). "Workers employed through farm labor contractors generally receive lower wages and are employed under working conditions inferior to those offered to workers hired by other agricultural employers." Commission Report at xxvii. For example, the piece rates paid to workers employed by FLC's sharply declined in real terms from $7.11 in 1989 to $5.01 in 1991. Commission Report, Case Studies at 684. FLC-employed piece rate workers also averaged nearly two dollars less per hour than piece rate workers who were directly employed by a grower. *Id.* In addition, the average annual income for FLC-employed farmworkers was $4,700 (in real 1989 dollars) as compared to $6,900 for farmworkers who were directly employed by the grower. *Id.* at 685. "The difference in income reflects not only the higher earnings of non-FLC workers in agriculture, but also their longer employment . . . and their greater likelihood of receiving Unemployment Insurance benefits when out of work." *Id.* Farmworkers who are directly employed by growers tend to receive higher unemployment insurance benefits, in part because growers are more likely to report their earnings than are crewleaders. *Id.*

A study of citrus pickers in Ventura County, California, graphically illustrates how growers improperly use crewleaders to reduce their labor costs. *See* United States General Accounting Office, *Illegal Aliens: Influence of Illegal Workers on Wages and Working Conditions of Legal Workers* 37-38 (GAO/PEMO-88-13BR) (1988). In the 1970's citrus workers were largely legal residents who belonged to the United Farm Workers of America, AFL-CIO ("UFW"). In the decade between 1970 and 1980, the UFW won contracts for the citrus workers which included health insurance, pensions and vacation benefits. Between 1980 and 1985, however, the UFW was replaced by farm labor contractors using crews composed primarily of undocumented workers.[4] By 1985, the union had been ousted and the citrus workers had lost wages and benefits "worth at least 18 percent of their total compensation." *Id.* at 38. As a result, "(s)ome of the veteran workers left the industry, but many remained to work at the lower levels of compensation." *Id.*

C. The Abuses of the Crewleader System

"Agriculture is perhaps unique for its substantial number of middlemen whose raison d'être is reducing labor costs by violating labor laws." Philip L. Martin, *Seasonal Workers Background and Issues* 38 (Nat'l. Comm'n. for Employment Policy, Research Rept. RR-85-04, 1985).[5] All too often, crewleaders profit by "stealing social security taxes, tampering with time cards, or absconding with the payroll." M. Linder, *Migrant Workers And Minimum Wage: Regulating the Exploitation of Agricultural Labor in the United States* 37 (1992). Many labor-intensive agricultural firms have modified their operations to shift the management of routine seasonal labor jobs to farm labor contractors, in hopes of evading potentially large penalties for violations of immigration or labor laws. Leo C. Polopolus and Robert D. Emerson, *Entrepreneurship, Sanctions, and Labor Contracting*, Southern Journal of Agricultural Economics 23, 57-68 (1991).

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[4] Interestingly the undocumented workers "were less experienced and picked more slowly" than the legal workers whom they replaced. *Id.* at 37.

[5] Professor Philip L. Martin served as a Commissioner on the United States Commission on Agricultural Workers.

Congressional hearings revealed, *inter alia*, that crewleaders were misrepresenting the nature and availability of work to farmworkers, providing them with false information on the terms and conditions of employment, forcing workers to buy goods and services from the contractor at excessive prices, committing payroll irregularities and supplying inadequate housing. *See* Commission Report at 46-47. These revelations among others led to the passage of the AWPA. *See* § II, *infra*. This statute specifically adopted the joint employer doctrine which imposes obligations on the fixed situs growers when the farmworkers are economically dependent upon them. Under this doctrine, growers as well as crewleaders are responsible for ensuring, *inter alia*, that workers receive accurate recruitment information, that workers are actually paid the wage rate promised, that workers receive no less than the legal minimum wage, and that employment taxes are properly deducted and paid. The litigation that has followed enactment of the AWPA demonstrates that these protections remain vitally necessary. Agricultural employers still, all too often, fail to pay farmworkers all or part of the wages due them. *See, e.g.*, *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 125-26 (3d Cir. 1984) (workers not paid for partially filled bins); *Cruz v. Val-A-Da, Inc.*, 127 Lab. Cas. (CCH) ¶ 33,072 (N.D. Ohio 1993) (workers not paid wages for several weeks); *Leach v. Johnston*, 812 F. Supp. 1198, 1212-13 (M.D. Fla. 1992) (employer improperly deducted meal costs from workers' wages); *Maldonado v. Lucca*, 636 F. Supp. 621, 624 (D.N.J. 1986) (employer's willingness to pay wages due on condition that workers waive related claims was "a duplicitous attempt to capitalize on the workers' utter lack of bargaining power"); *Bueno v. Mattner*, 633 F. Supp. 1446, 1454 (W.D. Mich. 1986), *aff'd*, 829 F.2d 1380 (6th Cir. 1987) (workers not paid wages due them); *Davis v. Williams*, 622 F. Supp. 386, 387 (W.D.N.Y.

1985) (worker received a $10 loan, but no pay and had to make his own way back to North Carolina).

In addition, farmworkers continue to be misled about the terms and conditions of employment. *See, e.g.*, *Martinez v. Shinn*, 992 F.2d 997, 998 (9th Cir. 1993) (employer failed to provide work until two weeks after promised starting date and unilaterally cut pay rate); *Escobar v. Baker*, 814 F. Supp. 1491, 1504 (W.D. Wash. 1993) (workers not told wage rate, crops to be picked, or cost of housing); *United States Dep't of Labor v. Anthony*, Lab. L. Rep. (CCH) ¶ 32,293 (Dec. 20, 1993) (workers were promised $.50 per bushel but paid $.40 per bushel).

Frequently no accurate records are kept of the hours worked or wages paid. *See, e.g.*, *Williams*, 747 F.2d at 125 (although workers did not take breaks, one hour per day was routinely deducted for lunch); *Beliz v. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1322 (5th Cir. 1985) (workers were paid $.30 per bucket, but their wage statements said they earned $.40 per bucket); *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983), *cert. denied*, 464 U.S. 850 (1983) (illiterate crewleader assigned to keep records, but didn't do so); *Sanchez v. Overmyer*, 845 F. Supp. 1183, 1190 (N.D. Ohio 1993) (employers' records failed to set forth basis on which wages were paid, number of piece work units earned and purpose of each wage deduction, and combined work of more than one individual in a single statement); *Antunez v. G & C Farms, Inc.*, 126 Lab. Cas. (CCH) ¶ 33,015 (D.N.M. 1993) (employers often failed to record hours worked, addresses, Social Security numbers, or piece rate on payroll records and recorded information for more than one worker under a single name); *Bueno*, 633 F. Supp. at 1454 (no records kept of hours worked); *Bresgal v. Brock*, 637 F. Supp. 271, 277, (D. Or. 1985), *aff'd and amended*, 843 F.2d 1163 (9th Cir. 1987) (same).

On many occasions, employment taxes are not paid. Indeed, "S[ocial] S[ecurity] A[dministration] data for 1989 show that agricultural employers were at least three times as likely as other employers not to report or to underreport their employees' earnings." United States General Accounting Office, *Hired*

Farmworkers: Health at Risk 5 (GAO/HRD-92-46) (1992). *See, e.g.*, *Calderon v. Witvoet*, 999 F.2d 1101, 1105 (7th Cir. 1993) (employer failed to deduct or pay Social Security taxes); *Beliz*, 756 F.2d at 1324 (no unemployment or Social Security taxes were paid on workers' wages); *Antunez*, 126 Lab. Cas. (CCH) ¶ 33,015 (same); *Sanchez v. Overmyer*, 845 F. Supp. at 1188 (same); *Bresgal*, 637 F. Supp. at 277 (same); *Certilus v. Peeples*, 101 Lab. Cas. (CCH) ¶ 34,587 (M.D. Fla. 1984) (same).

Moreover, employers continue to resist attempts to investigate AWPA violations. *See Donovan v. Mehlenbacher*, 652 F.2d 228, 229-30 (2d Cir. 1981) (farmer refused to answer a subpoena issued in a DOL investigation); *Matter of Hylton Hedman*, Lab. L. Rep. (CCH) ¶ 32,296 (Feb. 25, 1994) (farm labor contractor told worker not to divulge information to DOL investigator); *Brock v. Elsberry*, 663 F. Supp. 359, 366 (M.D. Fla. 1987) (employer repeatedly refused to allow DOL to conduct private investigative interviews).

Farmworkers seeking relief for FLSA/AWPA violations from their crewleaders often come up empty-handed. The record of John Miller, Jr., the labor contractor involved in *Aimable*, vividly illustrates this problem. Miller's violations of the statutes designed to protect farmworkers span the entire twenty-five years he worked for Long & Scott Farms. Yet despite repeated injunctions and orders to pay money damages, Miller has continued to violate the law. *See, e.g.*, *Dunlop v. John Miller, Jr.*, No. 75-484 (E.D. Va. Sept. 12, 1975) (Miller enjoined to comply with FLCRA); *Washington v. Miller*, No. 82-343-ORL-CIV-EK (M.D. Fla. April 26, 1983), *aff'd*, 721 F.2d 797 (11th Cir. 1983) (trial court found that Miller had misrepresented nearly every term of employment, failed to keep accurate payroll records or provide adequate wage statements, housed workers in unsanitary facilities, and paid the workers less than the minimum wage in violation of FLSA and FLCRA); *Brock v. John Miller, Jr.*, No. 86-606-CIV-ORL-18 (M.D. Fla. May 20, 1987) (enjoining Miller from further violations of the AWPA and ordering him to pay $50,433.06 in back wages and $25,716.53 in liquidated damages under FLSA). The Administrator of the

Department of Labor Wage and Hour Division has also found that Miller charged his workers twice the reasonable value of the meals he furnished. Nonetheless, none of these measures has halted Miller's operations or brought an end to his abuses. *See* Roland, *Abuse follows migrant workers: Haitians say crewleader didn't pay them, then had them beaten up,* Palm Beach Review, December 13, 1991 at A14. These same kinds of FLSA/AWPA violations are at issue in the case at hand. But the petitioners will not be able to collect any judgment from Miller because he has filed for bankruptcy. *In re: John Miller, Jr., Rudeen Quince Miller, Debtors*, No. 94-2166-8G3 (U.S. Bankr. Ct., M.D. Fla.)

II. CONGRESS ADOPTED A BROAD JOINT EMPLOYER DOCTRINE TO PROTECT FARMWORKERS FROM THE ABUSES ASSOCIATED WITH CREWLEADERS

Congress recognized that many workers would not receive minimum wage and other basic labor protections if the law placed responsibility for compliance exclusively on the shoulders of farm labor contractors. Consequently, the Fair Labor Standards Act and the Migrant and Seasonal Protection Act replaced the common law test of employment with a broadly applicable joint employer doctrine. Under this doctrine, courts must determine whether, as a matter of economic reality, farmworkers are dependent on a putative employer.

A. In Enacting FLSA and AWPA, Congress Specifically Targeted Abuses Associated With The Use Of Farm Labor Contractors

1. The Definition of Employer Under the FLSA

The original purpose of the Fair Labor Standards Act, passed in 1938, was to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" by "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." *D.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945), quoting Message of the President to

Congress, May 24, 1934. To this end, the FLSA contains an explicit and deliberate definition of the term "employ," which, then Senator Hugo Black, the bill's sponsor, characterized as "the broadest definition that has ever been included in any one act." 81 Cong. Rec. 7657 (1937). Describing this definition, the Court noted, "a broader or more comprehensive coverage of employees within the stated categories would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945). One of the practical consequences of this broad definition was to prevent businesses from escaping responsibility based on the presence of a labor contractor. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).

2. The Farm Labor Contractors Registration Act of 1963

In 1963, Congress concluded that the "plight of the migrant laborer in this country is an inexcusable and cancerous sore in the body politic." 110 Cong. Rec. 19,896 (1964) (statement of Rep. Bennett). Farmworkers' "transportation and living conditions are far below the general standard of living -- are indeed inhuman, the very worst conditions of human life in this country, totally unacceptable for human beings." *Id.* at 19,894 (statement of Rep. Powell). At the same time, it was noted that few of the "protective measures of federal law enjoyed by other workers are extended to migratory laborers." *Id.* at 19,986 (statement of Rep. Ryan). Secretary of Labor Willard Wirtz testified that neither state nor federal law safeguarded migrant workers: "It is an anomaly that the workers who stand in the greatest need of social and economic protection are the ones who have been denied such protection." *Migratory Labor Bills: Hearings on S. 521 and Other Bills Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. 29 (1963) (statement of Secretary of Labor Willard Wirtz).

The Farm Labor Contractor Registration Act, Pub. L. No. 88-582, 78 Stat. 920 (1963) ("FLCRA"), was enacted to stem the tide of "exploitation and abuse" of migrant workers at the hands of the farm labor contractors or crewleaders who transported and managed the workers for farmers. S. Rep. No. 202, 88th Cong., 1st Sess. 2 (1963). The focus of the new legislation was solely on the crewleader, who was required to obtain a certificate of registration from the Department of Labor as a condition of engaging in the activities of a farm labor contractor. Grounds for revocation of the certificate included giving false or misleading information to migrant workers concerning the terms of agricultural employment. Crewleaders were also subject to a fine for willful violations of the Act.

3. The Fair Labor Standards Amendments of 1966

In 1966, Congress acted to extend the benefits and protections of the FLSA to an estimated 7.2 million workers, including the nation's agricultural workers, who had been excluded from the original legislation. 112 Cong. Rec. 11376 (1966) (statement of Rep. Greene). Congress found that the exclusion of farmworkers from minimum wage protections was inequitable and inconsistent with the Act's purpose. In extending the Act's protections to farmworkers, Congress specifically recognized that questions would arise as to whether the farmworkers were the employees of the farmer or of a farm labor contractor. The Senate Committee fully endorsed the approach taken by this Court in *Rutherford Food Corp. v. McComb*, 331 U.S. 722. In *Rutherford*, the Court made clear that there is no single rule or test for determining whether an individual is an employee or an independent contractor, but that the "total situation controls." *Id.* at 730. The Committee approved of the criteria which aided the Supreme Court in assessing the total situation: (1) the extent to which the services rendered are an integral part of the principal's business; (2) the permanency of the relationship; (3) the opportunity for profit or loss; (4) the initiative, judgment, or foresight exercised by the one who performs the services; (5) the amount of investments; and (6) the degree of control which the principal has in the situation. S. Rep. No. 1487, 89th Cong. 2d Sess. (1966) *reprinted in* 1966 U.S.C.C.A.N. 3012-13.

4. The 1974 Amendments to FLCRA

In 1974, Congress found that FLCRA's exclusive focus on the crewleader had been an abject failure: "It has become clear that the provisions of the Act cannot be effectively enforced. Noncompliance by those whose activities the Act was intended to regulate has become the rule rather than the exception.... It is quite evident that the Act in its present form provides no real deterrent to violations." S. Rep. No. 1206, 93d Cong. 2d Sess. 3 (1974) ("1974 S. Rep."). A 1973 Labor Department study had found that two-thirds of labor contractors had never registered and that 73% were violating FLCRA's worker protections. H.R. Rep. No. 1493, 93d Cong., 2d Sess. 6 (1974). In the entire decade since FLCRA's enactment, the Department of Labor had referred only four cases to the Justice Department for prosecution, and only one contractor had been tried and convicted. 1974 S. Rep. at 3. In addition to creating a private cause of action for aggrieved workers, the 1974 amendments to FLCRA prohibited the use of unregistered labor contractors by growers and broadened the definition of "farm labor contractor" to include not only traditional transient crewleaders but also a number of fixed-situs employers. This soon led to complaints from growers who bitterly resented the bureaucratic burdens of registering as farm labor contractors and being fingerprinted "as if they were crewleaders with no fixed addresses or financial integrity." *Hearing on the Migrant and Seasonal Agricultural Worker Protection Act: Hearing on H.R. 7102 Before the Subcom. on Labor Standards of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. 44 (1982) (statement of Robert Collyer, Deputy Under Secretary of Labor) ("*1982 House Hearing*"). *See also*, H.R. Rep. No. 885 at 3-4. Department of Labor enforcement of the FLCRA became bogged down in the pursuit of technical registration violations against fixed situs employers and in litigation over the definition of "farm labor contractor." H.R. Rep. No. 885 at 2; *1982 House Hearing* at 50 (statement of Robert Collyer, Deputy Under Secretary of Labor).

5. The Migrant and Seasonal Agricultural Worker Protection Act of 1983

The twenty-year effort to reform the farm labor market by regulating farm labor contractors had "failed to reverse the historical pattern of abuse of migrant and seasonal farmworkers." H.R. Rep. No. 885 at 2-3. To redress these problems, Congress enacted the Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470, 96 Stat. 2584 (1983) (codified at 29 U.S.C. §§ 1801-72) ("AWPA"). Although the AWPA repealed the FLCRA in its entirety, *see* H.R. Rep. No. 885 at 34, in most respects the statute was simply renamed and re-enacted. The only sense in which the AWPA took a "completely new approach" to the farmworker problem, *Id.* at 3, was in abandoning the FLCRA's attempt to police all conduct through the single locus of the often-transient crewleader. Thus, the AWPA reclassified fixed situs employers as "agricultural employers" or "agricultural associations" and made them directly responsible for compliance with the Act's substantive worker protections.

The AWPA expressly provides that the term "employ" be given the same "meaning given such term under section 3(g) of the [FLSA]." 29 U.S.C. § 1802(5).[6] The use of the FLSA definition "was deliberate and done with the clear intent of adopting the 'joint employer' doctrine as a central foundation of this new statute." H.R. Rep. No. 885 at 6. Indeed, the joint employer doctrine was to be "the indivisible hinge between certain important duties imposed for the protection of migrant and seasonal workers and those liable for any breach of those duties." *Id.* Congress recognized that the very question posed by the instant case would frequently arise in the agricultural setting and reiterated its approval of *Rutherford* and its progeny in the agricultural sector:

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[6] The AWPA defines "agricultural employer" to mean "any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who...employs....any migrant or seasonal agricultural worker." 29 U.S.C. § 1802(2).

> [W]here an agricultural employer . . . asserts that the agricultural workers in question are the *sole* [sic] employees of an independent contractor/crewleader . . . , it is the intent of the Committee that the formulation as set forth in *Hodgson v. Griffin & Brand of McAllen, Inc.* be controlling. This decision makes it clear that even if a farm labor contractor is found to be a bona fide independent contractor, . . . this status does not as a matter of law negate the possibility that an agricultural employer may be a joint employer . . . of the harvest workers and jointly responsible for the contractor's employees.

Id. at 7. Congress further found that the adoption of the FLSA's concept of joint responsibility "presented the best means by which to insure that the purposes of this Act would be fulfilled." *Id.*

B. Congress Sought To Eliminate The Denial Of Minimum Wage And Other Labor Protections Associated With Labor Contractors By Adopting A Broadly Applicable Joint Employer Doctrine

The joint employer doctrine was adopted to ensure that the protections of AWPA and FLSA would not be routinely undercut. Congress recognized that its legislation would be ineffective if companies that sought to comply with these laws experienced economic pressure from competitors who were willing to flout the FLSA and the AWPA through the use of unscrupulous farm labor contractors. The FLSA

> seeks to eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation. . . . *This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce the competitive advantage according from savings in costs based upon substandard labor conditions.*

Roland Electrical Co. v. Walling, 326 U.S. 657, 669-70 (1946) (emphasis added). Accordingly, section 2(a)(3) of the FLSA declares that substandard labor conditions constitute "an unfair method of competition in commerce." 29 U.S.C. § 202(a)(3). Indeed, the deleterious effects of low labor standards upon competition in interstate commerce provided a primary constitutional basis for this legislation. *United States v. Darby*, 312 U.S. 100, 115 (1941).

To deter unfair competition that would lead to the undercutting of the minimum wage, Congress defined the term "employ" as "including to suffer or permit to work." *Nationwide Mut. Ins. v. Darden*, 112 S.Ct. 1344, 1350 (1992), (citing *Rutherford*, 331 U.S. at 728); H.R. Rep. 885 at 6. This definition is of "striking breadth" in comparison to the traditional common law definitions. *Id.*

The federal definition of "employ" was taken from similar provisions in state child labor laws, like the one enacted by New York State. *See Rutherford*, 331 U.S. at 728 n. 7, cited in *Nationwide Mutual*, 112 S.Ct. at 1350. The broad sweep of such statutory definitions induced companies that had the power to ensure compliance with the law to do so and withdrew incentives to ignore the law and blame intermediaries for permitting violations. As then Judge Cardozo said,

> *He must neither create nor suffer in his business the prohibited conditions*. The command is addressed to him. Since the duty is his, he may not escape it by delegating it to others. . . . He breaks the command of the statute if he employs the child himself. He breaks it equally if the child is employed by agents to whom he has delegated 'his own power to prevent.' . . . What is true of employment, must be true of the sufferance of employment. . . . Sufferance as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire knowledge. . . . *Within that rule, the cases must be rare where prohibited work can be done within the plant, and knowledge or the consequences of knowledge avoided.*

People on Inf. of Price v. Sheffield Farms-Slawson-Decker Co., 121 N.E. 474 (1918) (affirming criminal conviction of company for violation of child labor law by its milk truck drivers) (emphasis added). The "suffer or permit to work" standard was also designed to prevent companies with great economic power from demanding that financially weak workers or contractors bear sole responsibility under labor protective laws. As Judge Learned Hand said in comparable circumstances, it would undermine the purpose of the legislation, if employees

> are to have recourse as an employer only to one of their own, without financial responsibility or control of any capital. . . . *This misses the whole purpose of such statutes, which are meant to protect those who are at an economic disadvantage*. . . . It is true that the statute uses the word "employed," but it must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. It is absurd to class such a miner as an independent contractor in the only sense in which that phrase is here relevant. *He has no capital, no financial responsibility. He is himself as dependent upon the conditions of his employment as the company fixes them as are his helpers.*

Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 552-52 (2d Cir. 1914) (emphases added).[7]

Congress' broad definition of employer under the FLSA and the AWPA has the added benefit of maximizing a company's ability to predict with certainty its obligation to comply with these statutes. *See United States v. Rosenwasser*, 323 at 363 ("the unrestricted sweep of the term 'employee' serves to inform employers with definiteness and certainty that they are . . . liable for . . . violations of the Act"). It also offers workers greater certainty that they will benefit from these protections.

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[7] **Judge Learned Hand said that these types of statutes "should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them."** ***Lehigh Valley Coal*, 218 F. at 553. Ironically, the Eleventh Circuit said that it rejected petitioners' argument as based on "the laws that bind the Euclidian world," and as following "the transitive property of geometry."** ***Aimable*, 20 F.3d at 442.**

III. THE ELEVENTH CIRCUIT DECISION CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND OTHER CIRCUIT COURTS AND DEVASTATES FARMWORKERS' ABILITY TO SECURE MINIMUM LABOR PROTECTIONS IN CIRCUMSTANCES THAT TYPICALLY ARISE IN AMERICAN AGRICULTURE

The Eleventh Circuit decision in *Aimable* will profoundly affect agricultural labor relations in that circuit and elsewhere because the economic relationships at issue commonly arise in American agriculture. *See* § I, *supra*. Faced with the same "economic reality," other appellate courts have determined that the joint employer doctrine imposes liability on both the grower and the crewleader. The analysis which led to the Eleventh Circuit's anomalous conclusion is in fundamental conflict with the statutory language of the FLSA and the AWPA and the judicial precedents interpreting them.

The FLSA/AWPA definition of "employ," as the Eleventh Circuit acknowledged, requires the court to determine whether, as a matter of economic reality, the farmworkers are dependent on the putative employer. *Aimable*, 20 F.3d at 439, citing *Rutherford*, 331 U.S. at 729-30; *see Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961); *Bartels v. Birmingham*, 332 U.S. 126 (1947); H.R. Rep. No. 885 at 7. Nonetheless, the Eleventh Circuit did not comply with this obligation.

This Court's decision in *Rutherford* illustrates how to evaluate the economic reality in analogous circumstances. In that case, the Court found that a slaughterhouse employed its meat deboners even though they were hired and supervised by a contractor. The deboning occurred in the middle of the overall process of slaughtering the cattle, preparing the meat for deboning, packing it and shipping it, all of which was done by slaughterhouse employees. *Rutherford*, 331 U.S. at 729. While the contractor was to have "complete control" over his employees, the slaughterhouse did intervene to exercise some supervision. *Id.* at 725, 730.

The Court ruled that the deboners were employed by the slaughterhouse largely because under "the circumstances of the whole activity," the deboners "did a specialty job on the production line," *Rutherford*, 331 U.S. at 730, and were "part of the integrated unit of production." *Id.* at 729. Consequently, they "were more like" persons following "the usual path of an employee." *Id.* The Court also noted that the putative employer, not the contractor, owned the premises and the deboning equipment, and that the work, though skilled, "was more like piecework." *Id.* at 730. The Court also found that the contractor did not exercise any significant "initiative, judgment or foresight." *Id.* In reversing the lower court for its reliance on "isolated factors," the *Rutherford* Court held that a proper evaluation must consider "the circumstances of the whole activity." *Id.* at 730.

The Eleventh Circuit's analysis in *Aimable* cannot be squared with *Rutherford*. Here, the harvesting and packing jobs which Miller's crew members performed were integral to the grower's overall production process of planting, cultivation, harvesting, packing and shipping of vegetables. In *Aimable*, as in *Rutherford*, the contractor's employees could not perform their jobs without the facilities and equipment provided by the putative employer. Similarly, in *Aimable* as in *Rutherford*, the workers and the contractors were paid by the piece and neither were required to exercise any judgment or initiative. There exists no significant feature in the instant case that distinguishes it from *Rutherford*.

The Eleventh Circuit committed the same error of law that caused the reversal of the lower court's decision in *Rutherford*. Rather than evaluate the economic reality as a whole, the appellate court's decision was based on several isolated factors. In *Aimable*, unlike *Rutherford*, the court never identifies the essential nature of the economic relationships among the crewleader, the farmworkers and the grower. Had it done so, it would have found the essence of the economic relationships in *Aimable* and *Rutherford* to be the same: A contractor was hired to recruit and supervise workers but the grower provided the facilities, the equipment, the production process, the business acumen and the decisionmaking which made the workers economically dependent on the grower. *Aimable* permits an employer that effectively determines every important aspect of farmworkers' jobs to evade liability for FLSA and AWPA violations by delegating to an allegedly independent crewleader the same responsibility for control and supervision it would ordinarily assign to an employee-foreman. But in circumstances such as these, the farmworkers are economically dependent on the grower, whether the crewleader or the employee-foreman supervises the farmworkers in the field.

The Eleventh Circuit's decision also conflicts with decisions of the Fifth, Seventh, Ninth and Tenth Circuits that have applied *Rutherford* in the agricultural context. *See, e.g., Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317 (5th Cir. 1985); *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983); *Hodgson v. Griffin & Brand Of McAllen, Inc.*, 471 F.2d 235 (5th Cir. 1973); *Fahs v. Tree-Gold Co-op Growers, Inc.*, 166 F.2d 40 (5th Cir. 1948); *Secretary of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987) *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 (9th Cir. 1979)[8]; *Hodgson v. Okada*, 472 F.2d 965 (10th Cir. 1973).

The Eleventh Circuit's restrictive construction, if followed, signals the end of the joint employer doctrine in the Eleventh Circuit and possibly in other circuits as well. Farmworkers throughout the country face virtually the identical economic realities as the petitioners in *Aimable*. Thus, in the Eleventh Circuit and any other jurisdiction that adopts the Eleventh Circuit's analysis, *Aimable* is likely to substantially reduce the number of farmworkers receiving these minimum protections and impair their ability to recover damages for their losses. Growers who thought that they were obligated to ensure payment of the minimum wage and provision of other basic protections, despite the presence of a crewleader, will now feel free to ignore those protections. Such conduct will pressure competitors of such growers to lower their labor costs by adopting similar practices. Insolvent crewleaders will once again be the only available defendant in many FLSA and AWPA lawsuits.

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[8] The Eleventh Circuit contends that "there was no farm labor contractor involved" in *Real*, *Aimable*, 20 F.3d at 443, but the court is wrong. The Ninth Circuit in *Real* stated that on remand DSA might turn out to be the employer of the workers either: (1) because DSA effectively controlled the contractor (Driscoll) so that Driscoll was an employee of DSA and not an independent contractor; or (2) because, even though Driscoll was an independent contractor, DSA and Driscoll shared control over the strawberry workers so as to be joint employers of the workers. *Id.* at 755-56.

Thus, *Aimable* will produce precisely the result Congress sought to avoid. The farmworkers' only recourse for the denial of the AWPA and FLSA requirements will be against the party who has the least resources, is the least amenable to regulation and who, as matter of economic reality, has the least ability to determine the workers' real wages and working conditions.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted and the *Aimable* decision should be reversed.

Respectfully submitted,

SHELLEY DAVIS
(Counsel of Record)
BRUCE GOLDSTEIN
FARMWORKER JUSTICE
FUND, INC.
2001 S Street, N.W.
Suite 210
Washington, D.C. 20009
(202) 462-8192

September 7, 1994

Counsel for Amici Curiae

(3)

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No. 94-264

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

VERGNAUD AIMABLE, et al.,
Petitioners,

v.

LONG & SCOTT FARMS, INC.,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION

CHARLES KELSO
(Counsel of Record)
FISHER & PHILLIPS
1500 Resurgens Plaza
945 East Paces Ferry Road
Atlanta, Georgia 30326-1125
(404) 231-1400
Counsel for Respondent

33 pp

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

STATEMENT OF THE CASE 2

ARGUMENT 5

I. THE ELEVENTH CIRCUIT APPLIED THE APPROPRIATE FACTORS WHEN MAKING ITS JOINT EMPLOYMENT DETERMINATION IN THIS CASE 5

II. THE ELEVENTH CIRCUIT PROPERLY HELD THAT THE REGULATORY FACTORS OF "CONTROL" AND "SUPERVISION" WEIGH AGAINST A JOINT EMPLOYMENT FINDING. 12

A. Miller's Harvesting Operations 12

B. Nature and Degree of Control of the Workers 15

C. The Degree of Supervision, Direct or Indirect, of the Work 20

III. THE ELEVENTH CIRCUIT GAVE DUE CONSIDERATION TO THE "ECONOMIC REALITY" IN THIS CASE AND DID NOT ADOPT A NEW TEST FOR DETERMINING JOINT EMPLOYMENT. 23

TABLE OF CONTENTS (cont'd.)

A. This Court Should Reject Plaintiffs' Request That the Court Impermissibly Expand the AWPA and the FLSA so as to Make All Farmers Automatically a Joint Employer of the Workers Hired by an Independent Contractor 25

CONCLUSION 28

TABLE OF AUTHORITIES

Cases **Page**

Aimable v. Long & Scott Farms,
Inc., 20 F.3d at 443
(11th Cir. 1994) . . . . *passim*

Beliz v. W. H. McCleod & Sons
Packing Co., 765 F.2d 1317
(5th Cir. 1985) 9, 10

Bonnette v. California Health
and Welfare Agency, 704 F.2d
1465 (9th Cir. 1983) 6, 9

Castillo v. Givens,
704 F.2d 181 (5th Cir. 1983) 10

Charles v. Burton,
1994 U.S. Dist. LEXIS
10017 (M.D. Ga., July 1, 1994.) 26

Dole v. Continental Cuisine, Inc.,
751 F.Supp. 799 (E.D. Ark. 1990) 6

Donovan v. Brandel,
736 F.2d 114 (6th Cir. 1984) 8

Donovan v. Gillmor,
535 F.Supp. 154 (N.D. Ohio 1982) 8

Fahs v. Tree-Gold Co-Op Growers
of Florida, 166 F.2d 40
(5th Cir. 1948) 9

Gilbreath v. Cutter Biological,
Inc., 931 F.2d 1320
(9th Cir. 1991) 4, 6, 9

TABLE OF AUTHORITIES (cont'd.)

Hodson v. Griffin & Brand of McAllen, Inc., 471 F.2d 325 (5th Cir. 1973) 24

Patel v. Wargo, 803 F.2d 632 (11th Cir. 1986) 24

Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748 (9th Cir. 1979) 8, 9

Riojas v. Seal Produce, Inc., 82 F.R.D. 613 (S.D. Tex. 1979) 6

Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) 24

Secretary of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987) 8

United States v. Silk, 331 U.S. 704 (1947) 8

Statutes and Regulations **Page**

29 C.F.R. § 500.20(h)(4) 2

29 C.F.R. § 500.20(h)(4)(ii)A-E 5

29 C.F.R. § 780.331 27

29 U.S.C. § 201 2

29 U.S.C. § 1801 2

29 U.S.C. § 1802(5) 2

IN THE

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LONG & SCOTT FARMS, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

Respondent Long & Scott Farms, Inc. ("Long & Scott")[1] respectfully requests that this Court deny the Petition for a Writ of Certiorari, seeking review of the judgment of the United States Court of Appeals for the Eleventh Circuit.

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[1] Respondent Long & Scott Farms, Inc. has no corporate parents or subsidiaries.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 20 F.3d 434 (11th Cir. 1994). The opinion of the United States District Court for the Middle District of Florida is unreported. Both of these opinions are reproduced as an Appendix in the Petition.

STATEMENT OF THE CASE

To prevail below, Petitioners/Plaintiffs ("Plaintiffs") were required to establish that Long & Scott was their "employer" within the meaning of the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. § 1801, et seq. and within the meaning of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq. All parties agree that the Plaintiffs were employees of Defendant John Miller, Jr. ("Miller") and that Miller was an independent contractor and not a mere employee/foreman vis-a-vis Long & Scott. The legal issue presented to the Eleventh Circuit was, therefore, whether Long & Scott also employed the Plaintiffs, i.e. -- whether Long & Scott and Miller were "joint employers."

AWPA specifically adopts the FLSA term "employ" by incorporating reference, 29 U.S.C. § 1802(5) and the regulations promulgated by the United States Department of Labor under AWPA define the term "employ" to include the "joint employment" principles applicable under the FLSA. Title 29 C.F.R. § 500.20(h)(4) provides that "'joint employment' under the [FLSA] is 'joint employment' under the AWPA." Because of AWPA's adoption of the FLSA definition of "employ" and its tests of joint employment, this Court will recognize that: (1) these tests are not new -- they are the same tests that have been applied by courts for more than 50 years and (2) these tests are not unique to agricultural cases -- they are the same tests that apply to all industries covered by the FLSA, such as construction, manufacturing, etc.

The parties in the district court below agreed that the factual record on the joint employment issue was undisputed and cross motions for summary judgment were filed on this issue. The Eleventh Circuit analyzed the "economic reality" of all of the facts and circumstances presented by this undisputed factual record and upheld the district court's conclusion that Long & Scott was not an "employer" or a "joint employer" of the Plaintiffs within the meaning of AWPA or FLSA.

The Eleventh Circuit properly analyzed the regulatory and non-regulatory factors used to determine joint employment under AWPA and the FLSA, and applied traditional, well established legal tests which have been developed over the years in this area of the law. In fact, the Eleventh Circuit's opinion is unique only in that it makes a careful, separate analysis of each of the various factors and decides what weight, if any, should be given those factors as appropriate in this particular case, instead of merely string citing all factors that might support the its ultimate legal conclusion.

There are no "special or important" reasons to grant Plaintiffs' Petition as contemplated by Rule 10.1. The Eleventh Circuit's decision is not in conflict with any decision of this Court or any other Court of Appeals. Nor has the Eleventh Circuit "so far departed from the accepted and usual course of judicial proceedings... as to call for an exercise of this Court's power of supervision." See Rule 10.1.a In fact, just the opposite is true. The Eleventh Circuit decision carefully applies the traditional factor-based analysis of joint employment and is consistent with the decisions of other courts which have been called upon to render joint employment determinations. See, e.g., Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1324 (9th Cir. 1991).

Long & Scott files this Brief in Opposition primarily because of its obligation under Rule 15.1 to "address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issue would properly be before the Court if certiorari were granted." Three (3) such misstatements will be addressed by this Brief. First, the Plaintiffs argue that the Eleventh Circuit erred by concluding that four (4) non-regulatory factors are irrelevant to test the joint employment issue presented in this case. These four (4) non-regulatory factors advanced by the Plaintiffs do appear in some of the cases dealing with various employment issues developed under AWPA and the FLSA. These factors are, however, irrelevant to test the joint employment issue presented in this case. Second, the Plaintiffs erroneously argue that the Eleventh Circuit failed to give due consideration to the "economic realities" of the alleged joint employment relationship in the case and that it adopted a new test for determining joint employment. Third, the Plaintiffs have distorted the factual record to argue that the Eleventh Circuit misapplied the regulatory factors of "control" and "supervision" which everyone agrees are relevant factors to analyze joint employment.

ARGUMENT

I. THE ELEVENTH CIRCUIT APPLIED THE APPROPRIATE FACTORS WHEN MAKING ITS JOINT EMPLOYMENT DETERMINATION IN THIS CASE

Plaintiffs concede that the five (5) "regulatory factors" analyzed by the Eleventh Circuit are relevant to the joint employment issue presented in this case. These five (5) factors are: (1) the nature and degree of control of the workers, (2) the degree of supervision, direct or indirect, of the workers, (3) the power to determine the pay rates or the methods of payment of the workers, (4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers, and (5) the preparation of payroll and the payment of wages. 29 C.F.R. § 500.20(h)(4)(ii)A-E.

The Ninth Circuit Court of Appeals applies the following test in analyzing the joint employment issue under the FLSA:

> This circuit...has applied an 'economic reality' test which identifies four factors: whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.

Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1324 (9th Cir. 1991), citing Bonnette v. California Health and Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983). (Emphasis added.) The Ninth Circuit's "economic reality" test of joint employment under the FLSA is therefore identical to the five-factor joint employment test set forth in the AWPA regulations. See also, Riojas v. Seal Produce, Inc., 82 F.R.D. 613, 618-19 (S.D. Tex. 1979) (In making a joint employment determination, the court looks to "day-to-day participation, control, involvement or supervision exercised by the alleged employer. [Citation omitted.] Also important in this determination is the extent of involvement of the alleged employer and his right in hiring, firing and setting of wages of the worker."); Dole v. Continental Cuisine, Inc., 751 F.Supp. 799, 802-03 (E.D. Ark. 1990).

The Eleventh Circuit in this case recognized that these five (5) regulatory factors are the keys to unlocking the joint employment issue in this case. These five (5) factors are of paramount importance in determining any alleged joint employment relationship under AWPA and the FLSA. If a farm, or any other company in any industry, does not supervise the workers, control the workers, hire or fire the workers, pay the workers, determine their pay or prepare payroll records, they are very probably not a joint employer of the workers. Both the Eleventh Circuit and the district court below held that all five (5) of these regulatory factors weigh heavily against a joint employer finding in this case. Other than their distorted factual characterizations of the "control" and "supervision" factors discussed below, Plaintiffs do not even argue that the Eleventh Circuit erred in concluding that these five (5) crucial factors weight against a joint employer finding.

The Eleventh Circuit also analyzed the six (6) "non-regulatory factors" advanced by the Plaintiffs in this case in making its joint employment determination. The Eleventh Circuit carefully examined each non-regulatory factor independently to determine "whether the factor is relevant to this case; and, if so, whether it supports a finding of joint employment." Aimable, 20 F.3d at 443. Four (4) of the non-regulatory factors -- (1) investment in equipment and facilities, (2) opportunity for profit and loss, (3) permanency and exclusivity of employment, and (4) the degree of skill required to perform the job -- were correctly found by the Eleventh Circuit to be irrelevant based on the facts and circumstances presented in this case.

Plaintiffs' argument that these four (4) factors are relevant is wrong. These factors are found in some of the cases dealing with various employment issues developed under the AWPA and the FLSA. They are, however, properly used only to analyze relationships which are not at issue in this case. These four (4) factors are properly used to determine (1) whether a crewleader is an independent contractor or a mere employee vis-a-vis a farmer or (2) whether individual workers are themselves independent contractors or employees. For the reasons explained by the Eleventh Circuit, these four (4) factors are irrelevant to determine whether Long & Scott is a joint employer, along with Miller, of the individual workers in this case.

Miller meets all four (4) of these tests -- he has substantial investment in his harvesting business, he bears a substantial risk of profit or loss, he solicits and performs harvesting work for multiple customers simultaneously, and he exercises considerable skill in managing his million dollar a year business. Accordingly, all parties agree that Miller is an independent contractor vis-a-vis Long & Scott. Likewise, the Plaintiffs meet none of these tests, and all parties agree that they are employees and they are not independent contractors. Thus, these four (4) tests tend to establish what is already agreed -- Miller is an independent contractor and the Plaintiffs are employees. These factors say nothing about whether Long & Scott has done something to make it legally responsible for Miller's employees as a joint employer.

The cases relied upon and cited by the Plaintiffs which deal with the issue of whether individual workers are themselves employees or independent contractors are irrelevant. Again, no one contends that the Plaintiffs here are independent contractors; everyone agrees that they are employees. Typical of these cases is Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748 (9th Cir. 1979).[2] There, strawberry pickers brought suit under the FLSA claiming to be employees of Driscoll Farms. Driscoll Farms contended that the workers were themselves independent contractors, not its employees. No crewleader was involved at all.

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[2] Other inapposite cases cited by the Plaintiffs in their Petition where the issue is whether individual workers are themselves employees or independent contractors vis-a-vis a farmer (or company) alleged to be their employer include United States v. Silk, 331 U.S. 704 (1947) (individual coal workers are employees, not independent contractors; truck owners/drivers are independent contractors and not employees); Secretary of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987) (individual cucumber pickers are employees and not independent contractors); Donovan v. Brandel, 736 F.2d 114 (6th Cir. 1984) (individual cucumber pickers are independent contractors and not employees); Donovan v. Gillmor, 535 F.Supp. 154 (N.D. Ohio 1982) (individual cucumber pickers are employees and not independent contractors).

The Ninth Circuit in Real cited a factor test which includes the four (4) non-regulatory factors determined to be irrelevant by the Eleventh Circuit. According to the Real court, these are factors "which may be useful in distinguishing employees from independent contractors" under the FLSA. Id. at 754. Thus, the Ninth Circuit in Real analyzed a relationship which is not at issue here, and Plaintiffs reliance on this case is misplaced. As noted above, the Ninth Circuit applies a different factor test which is consistent with the Eleventh Circuit's decision in Aimable when making a true joint employer determination under the FLSA. See Gilbreath and Bonnette, supra. Comparing the different tests applied by the Ninth Circuit to these very different employment issues supports the Eleventh Circuit's decision that these four (4) factors advanced by the Plaintiffs are irrelevant in this case and that the Eleventh Circuit's decision is consistent with the Courts who have addressed this issue.

Likewise, the cases cited by the Plaintiffs which deal with the issue of whether a crewleader is an independent contractor or a mere employee vis-a-vis a farmer are likewise irrelevant. No one contends that Miller is a mere employee/foreman of Long & Scott; everyone agrees that he is an independent contractor and an employer of the Plaintiffs. Examples of these inapposite cases include Fahs v. Tree-Gold Co-Op Growers of Florida, 166 F.2d 40 (5th Cir. 1948); Beliz v.

W. H. McCleod & Sons Packing Co., 765 F.2d 1317 (5th Cir. 1985); Castillo v. Givens, 704 F.2d 181 (5th Cir. 1983).

In Beliz, the Fifth Circuit held that a crewleader (Galen) was a mere employee of the farmer (McCleod) and, therefore, the farmer was the sole employer of the workers. Beliz, 675 F.2d at 1328. The farmer in Beliz, unlike Long & Scott here, (1) stayed in the fields to supervise the harvest work, (2) possessed the authority to fire individual workers, (3) established the workers' piece rates, (4) prepared payroll documents, (5) maintained workers' compensation on the workers, and (6) paid the crewleader only a small piece-rate override. Id. at 1322 and 1328. In Castillo, crewleader Tonche, whom the farmer claimed to be the sole employer of the workers, himself chopped cotton in addition to supervising other workers. Castillo, 704 F.2d 191. In concluding that Tonche was himself a mere employee of the farmer, the court considered of "particular importance" the fact that the farmer "did not pay Tonche enough for Tonche himself to pay the workers minimum wage." Id. at 192. Thus, not only was the legal issue presented to the courts in Beliz and Castillo different from the joint employer issue presented here, the cases are factually distinguishable on numerous grounds as well. Miller was admittedly an independent contractor, and the undisputed facts establish that he ran a large business enterprise. (See Section II, A below.) He was not a mere foreman/employee as was the crewleader in these cases.

This is not the first time in this case that Long & Scott and the Plaintiffs have debated the relevancy of these four (4) non-regulatory factors. Long & Scott's summary judgment brief to the district court argued that these four (4) non-regulatory factors were irrelevant. In Plaintiffs' response to Long & Scott's brief on this issue, Plaintiffs acknowledged an "analytical error" that they had made in their principal brief.

> It was thus somewhat confusing and erroneous for Plaintiffs to directly apply factors enunciated by the courts in determining the relationship between a farm labor contractor and a farmer in analyzing the relationship between individual workers (the Plaintiffs) and a farmer (Long & Scott). Plaintiffs apologize for this error.

(See Plaintiffs' Response Brief, pp. 26-27.) (Emphasis added.) In their Petition, Plaintiffs have reverted to relying on these admittedly "confusing and erroneous" cases and factors which test employment relationships which are not at issue in this case.

The Eleventh Circuit properly analyzed the probative factors relevant to the legal issue of joint employment presented in this case. As the Eleventh Circuit noted in its decision "it is telling that no other court has adopted each of appellants' proposed factors in one case. The reason: not all factors are relevant in every case." Aimable, 20 F.3d at 444.

II. THE ELEVENTH CIRCUIT PROPERLY HELD THAT THE REGULATORY FACTORS OF "CONTROL" AND "SUPERVISION" WEIGH AGAINST A JOINT EMPLOYMENT FINDING

A. Miller's Harvesting Operations

The Petition attempts to paint a picture of Miller (and, therefore, his workers) as being completely dependent on Long & Scott for his livelihood and but a mere conduit of Long & Scott's ultimate control and supervision of Miller's workers. Plaintiffs claim that Long & Scott has interposed Miller as a "fly-by-night operator" to shield itself from liability. Plaintiffs' characterization of Miller is simply not supported by the record. In order to place Plaintiffs' factual arguments on the "control" and "supervision" factors in their proper perspective, a review of Miller's harvesting operations during the relevant time frame of this case is necessary.

Miller was engaged in the business of contract harvesting of fruit and vegetables in Florida, North Carolina, South Carolina, Georgia, Kentucky and Alabama. (Miller Aff., ¶ 2; Miller, pp. 17-25)[3]

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[3] The factual record relevant to this Petition consists primarily of the affidavit and deposition testimony of Frank D. Scott, Jr. and Defendant John Miller, Jr. The district court docket sheet indicates that the affidavits of Messrs. Scott and Miller, filed in connection with Long & Scott's motion for summary judgment, are included in the record in "separate file" number two. Mr. Scott's affidavit will be cited as "Scott Aff., ¶ ___," and Mr. Miller'saffidavit will be cited as "Miller Aff., ¶___," throughout this brief. The docket sheet also indicates that the deposition transcripts of Messrs. Scott and Miller, filed in connection with the Plaintiffs' motion for summary judgment, are included in the record in "separate file" number one. Mr. Scott's

His business revenues were approximately one million dollars ($1,000,000.00) per year. (Miller Aff., ¶¶ 2, 43; Miller, pp. 181-85, 253) Between 1985 and 1989, Long & Scott contracted with Miller to pick, grade and pack its cucumber, corn and cabbage crops and to grade and pack its potato crop. (Miller Aff., ¶ 3; Miller, p. 68; Scott Aff., ¶ 4)[4]

Miller and Frank Scott met before each crop harvest to negotiate a price that Long & Scott agreed to pay Miller for his harvesting services. (Miller, pp. 104-106, 266-67; Scott Aff., ¶ 6; Scott, p. 62) These arms-length negotiations resulted in total payments from Long & Scott to Miller of approximately four hundred twenty thousand dollars ($420,000.00) to seven hundred fifty thousand dollars ($750,000.00) each year between 1985-1989. (Miller, p. 185; Scott, pp. 162-63; Scott Aff., ¶ 21) These payments from Long & Scott, however, represented only about one-half of Miller's total revenues from his operations during these years; the balance was from harvesting citrus and vegetables for other farmers. (Miller, p. 253; Miller Aff., ¶ 43; Scott Aff., ¶ 22) Out of his revenues, Miller covered not only wage payments to his workers but the indirect, overhead costs of obtaining and maintaining his crew (recruitment, labor camp costs, transportation), supervision, equipment purchase and upkeep, taxes,

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deposition transcript will be cited as "Scott, p. ___," and Mr. Miller's deposition transcript will be cited as "Miller, p. ___," throughout this brief.

[4] The statement contained in the Petition that Long & Scott "hired" Miller to "recruit and furnish migrant farm workers" is simply not correct. (Petition, p. 5)

lawyers, accountants, insurance, etc. Miller's wage payments to his workers represented only one-half of his total revenues. (Miller Aff., ¶¶ 2, 43; Miller, pp. 181-85, 253) He had, therefore, approximately one-half million dollars ($500,000.00) per year to cover his overhead costs and profit. How Miller controlled these overhead costs determined whether Miller posted a profit or loss.

It is undisputed that Miller was solely responsible for the recruitment, transportation and housing of his crews and the expenses associated with these activities. (Petition, p. 5.) While Long & Scott was Miller's single largest customer, Miller contracted with many other farmers to harvest their crops. (Miller Aff., ¶¶ 43-45; Miller, pp. 7-30, 253, 282-86) Miller contracted with Bowen Brothers to pick citrus throughout Florida. (Id.)[5]

Miller had his harvesting operation set up so that he was not required to supervise field workers personally. (Miller, pp. 271-73; Scott Aff., ¶ 23) He employed field supervisors to monitor all of his crews. (Id.) When Miller had contracts with different farmers which ran at the same time, he employed different supervisors for the different locations. (Id.) Miller's employment of supervisors freed him to manage his operations -- seeking harvesting contracts, overseeing his labor camp and garage operation, meeting with his professional advisors, etc. Miller had a substantial investment in his harvesting operations, as well as large overhead maintenance costs.[6] Miller was not a mere Long & Scott foreman who was hired only to "hire and [personally] supervise migrant workers." (Petition, p. 26.)

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[5] Miller's citrus harvesting operations started the first of December and lasted until mid-April. (Id.) This is the same time period when Miller harvested cabbage for Long & Scott. (Id.) Miller employed 75 workers harvesting citrus and approximately 24 workers harvesting cabbage. (Id.; Miller, pp. 231-32, 270-72) Miller decided which of his workers harvested citrus and which harvested cabbage. (Miller, p. 271)

B. Nature and Degree of Control of the Workers

The Eleventh Circuit held that this regulatory factor weighed against a joint employer finding. This conclusion is amply supported by the record. Miller alone decided the manner by which he fulfilled his harvesting contracts with Long & Scott. From Long & Scott's perspective, Miller certainly controlled his crew. Miller alone decided (1) whether he used his crew exclusively or whether he subcontracted work to local crewleaders; (2) the point at which it was no longer profitable for him to continue to harvest the cucumber or cabbage fields; (3) which members of his crew performed hourly-paid grading work and which performed piece-rate harvesting; (4) when his crews started and stopped work; (5) how many workers to have in the field; (6) which workers performed different harvesting tasks -- e.g. pulled or packed corn, cut cabbage or closed boxes, picked cucumbers or drove the trucks; (7) who to hire, fire and discipline; and (8) which of his crew worked under the different harvesting contracts Miller had with different farmers, etc. (See Miller Aff., ¶¶ 11, 13-17, 27-31, 34; Miller, pp. 201, 267-86; Scott Aff., ¶¶ 6, 11, 15, 18; Scott, pp. 14-15, 56-57, 64.)[7]

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[6] In addition to the costs of recruiting and housing his work force, Miller owned and operated two 40-passenger buses, two 18-passenger vans, 3 pickup trucks used by Miller and his supervisors, 2 citrus "goats" (lift trucks used to move fruit in the orchards), 6 to 8 24-foot bed hauling trucks, 2 wagons to carry tubs and ladders, 150 to 200 cucumber bins, 75 citrus tubs, 75 ladders, 50 cabbage knives, 6 rickrack tools, 4 field toilets, a water tank, 6 igloos for drinking and hand washing, and 2 computers for payroll and bookkeeping. (Miller Aff., ¶ 46; Miller, pp. 253-59) Miller purchased his own mule train in March, 1989, for $12,000.00. (Miller, pp. 19-20) Miller operated a vehicle repair garage in Tangerine, Florida and employed a full time mechanic to keep his equipment operating. (Miller Aff., ¶ 46) Miller estimated that his vehicles and equipment represented an investment of approximately$130,000.00. (Miller Aff., ¶ 47) He also paid some of his workers daily and may have had $12,000 to $13,000 in wages outstanding before he was paid by Long & Scott. (Miller, pp. 267-68) Miller employed a number of professional advisors -- CPA's, attorneys, and labor advisors -- to assist him in his various operations. (Miller Aff., ¶¶ 49-53; Miller, pp. 283-85)

Looking at who controlled the Plaintiffs from the Plaintiffs perspective, it was certainly Miller. He had total control of their work in the field. He recruited, housed, transported, paid and fed them. (Miller Aff., ¶¶ 31-36.) He provided them citrus work during the winter and out-of-state harvest work in the summer. (Miller Aff., ¶¶ 43-45.) How much they earned depended on how much harvesting work Miller could contract.

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[7] For example, Miller decided which workers picked citrus for Bowen Brothers and which workers harvested the cabbage for Long & Scott when those seasons overlapped. (Miller, pp. 269-73)

Plaintiffs assert, however, that Long & Scott "controlled" the Plaintiffs. To support their control argument, Plaintiffs distort the record and mischaracterize certain facts in terms of control. For example, Plaintiffs urge that "the amount of work available to Petitioners was controlled by Long & Scott. Long & Scott unilaterally decided what crops to plant, when to plant, and which plots to plant first.... Long & Scott checked on the crops on a regular basis and in consultation with Miller decided when to harvest and what specific blocks to harvest each day." (Petition, p. 6.)

The Eleventh Circuit correctly concluded that "Plaintiffs argument misses the point." Aimable, 20 F.3d at 440. Of course, Long & Scott decided what crops to plant and when to plant them. Long & Scott is in the farming business; it makes all decisions regarding planting, as well as cultivation, tillage, irrigation, marketing, etc. of the crops. (Miller Aff., ¶ 30) It bears the weather risks and markets risks of the crops. Miller, on the other hand, is in the harvesting business. He makes all the decisions regarding his business. He bears the risks associated with recruiting, transporting, housing, and otherwise maintaining his large work force and effectively managing the harvest and supervising his crews in the fields. Miller's lack of involvement in farming decisions unrelated to his harvesting contracts is irrelevant to the joint employer issue. The Eleventh Circuit correctly decided that Long & Scott agricultural decisions -- decisions which only indirectly effected the number of workers necessary to harvest the land -- fell far short of the requisite "control" to establish that Long & Scott was a joint employer. Amiable, 20 F.3d at 440-41.

The work available to the Plaintiffs was "controlled" by what harvesting contracts their employer, Miller, undertook for them to perform -- from Long & Scott and from other customers. If Miller contracted with another farmer to pick citrus, which he did, that would also determine the amount of work available to the Plaintiffs. The "economic reality" in this case is that Miller alone had absolute, unfettered control over Plaintiffs and their employment.

The contractual arrangement between Long & Scott and Miller was no different from the contractual arrangement between a housing developer/general contractor and the numerous subcontractors who do framing, plumbing, roofing, painting, etc. necessary to build houses. The painting contractor, for example, certainly does not determine what houses to build, when to build them or what color to paint them. The painting contractor and the developer do coordinate to determinate when various units will be ready to paint, the painting priority based on timing of sales, colors desired by customers, etc. The developer would also inspect the houses to determine compliance with contract specifications before accepting them as complete. Such coordination and inspection is not "control" so as to make the developer the joint employer of the painting contractor's employees.

The Plaintiffs further mischaracterized the record in an attempt to establish "control" by Long & Scott by claiming that Frank "Scott supervised the grading of vegetables to make sure the job was done right, Scott notified Miller if a worker was not doing a good job or if too many undersized cucumbers were being picked..." (Petition, p. 6)

Frank Scott did inspect the overall grading operation at Long & Scott's packing house to make sure that the crates were properly packed and graded. (Scott, p. 79) He did not, however, supervise or control the individual workers; Miller employed a supervisor to supervise the grading house workers. (Id.; Miller Aff., ¶ 27) The factual record cited by the Plaintiffs on this point states:

[By counsel for Plaintiffs]

> Q. You would then go to the supervisor person [in the packing house] and express your concerns that the particular individual is no doing the job right?

[By Scott]

> A. The result wasn't right -- not the particular individual, but the result wasn't right. They [Miller's supervisors] would have to pick the individual out.

(Scott, p. 80) (Emphasis added.)

This record citation relied on by the Plaintiffs further shows that Long & Scott contracted for an agreed upon result and that Miller was responsible for how the result was accomplished. If Miller's employees did not achieve contract specifications, it was entirely proper to demand from Miller's supervisor proper contract performance. And, as discussed below, not one single Plaintiff in this case has stated that he was ever supervised in the packing house or anywhere else by Scott.

C. The Degree of Supervision, Direct or Indirect, of the Work

The Eleventh Circuit also held that this regulatory factor weighed against a joint employer finding. This conclusion is also amply supported by the record. Miller employed three (3) field supervisors and a packing house supervisor who supervised and controlled the workers in his crew. (Miller Aff., ¶ 27) Miller decided how many supervisors to place in the fields; Miller alone hired and controlled his supervisors and determined the methods and amount of their pay. (Miller Aff., ¶¶ 27, 29, 30; Miller, pp. 270-73, 279-81; Scott Aff., ¶ 23)

Miller and his supervisory staff supervised Miller's crews in the fields. (Id.) As Miller testified:

[By counsel for Long & Scott]

Q. Do you decide which of your workers to fire?

[By Miller]

A. Yes.

Q. And anybody that you are going to apply any discipline to, that's up to you or your supervisors in the field?

A. Right.

Q. Does Long & Scott ever tell you that you've got to fire or discipline a worker?

A. Nope.

(Miller, pp. 280-81) (See also Miller Aff., ¶ 27; Scott Aff., ¶ 23)

A Long & Scott employee was rarely even in the field, except for Petty, Long & Scott's mechanic, who drove the corn harvester pursuant to Miller's directions. (Scott Aff., ¶ 24; Miller Aff., ¶ 31; Miller, pp. 269-70) Petty did not supervise employees, he "just dr[o]ve the machine." (Miller, p. 270) Scott or his field employees did occasionally speak to Miller or his supervisors in the field to relay any messages from the packing house, such as information about produce orders or rejection of produce by the federal inspectors. (Scott Aff., ¶ 24; Miller Aff., ¶ 31; Miller, p. 236, Scott, pp. 132-33) These Long & Scott employees did not supervise any of the workers, however. (Id.)

The Plaintiffs themselves have identified Miller and his staff as their sole supervisors in the field. During discovery, Long & Scott served an interrogatory on all 206 then named Plaintiffs requesting that they "identify all individuals who supervised your work while you allegedly worked at Long & Scott Farms." (See generally responses filed by individual Plaintiffs contained in "separate file" No. 1) Not a single Plaintiff identified Frank Scott or any other Long & Scott employee as their supervisor. Rather, all 206 Plaintiffs responded that Miller or members of his supervisory staff supervised their work.

Notwithstanding these undisputed facts which establish that Miller and his staff alone supervised his crews, the Plaintiffs claim that "Long & Scott also exercised some direct supervision over Petitioners." (Petition, p. 7) To support this conclusion, they cite one Plaintiff's interrogatory answer which states that there was "a man from the company who came out to the fields every day and told us what to do, including what to cut and how to pack. He spoke to me personally on several occasions." (Petition, p. 7) Petitioners claim that "more than thirty other Petitioners submitted similar statements." (Id.)

The Plaintiffs' again mischaracterize the record on this point. As noted above, all 206 Petitioners (100%) responded that Miller or members of his supervisory staff supervised them in the fields. None of the 30 interrogatory responses (15%) relied on by the Plaintiffs identifies a Long & Scott employee by name or description -- they all claim that a "white man" or an anonymous "man from the company" came out to the fields. The majority of even these few responses simply claim that the anonymous "man from the company" checked boxes, looked around, or spoke to Miller or his supervisory staff. (See "separate file" No. 1) Even if a Long & Scott employee checked boxes, spoke with Miller and looked around, it is not inconsistent with the Eleventh Circuit's holding that Long & Scott did not supervise Miller's crews. There are a number of reasons a "man from the company" may need to be in the field or communicate with Miller which have nothing whatsoever to do with field supervision. (See Scott Aff., ¶ 24; Scott, p. 132; Miller Aff., ¶ 31, Miller, p. 236)

Only eleven of the 206 responses (5%) claim that the anonymous "man from the company" told the Plaintiffs to do anything. This is remarkable in view of the fact that Plaintiffs' counsel knew of this important factor and presumably made every effort to probe for any such contact in preparing these discovery responses. In any event, all of the Plaintiffs admit that Miller and his staff supervised their work.

The Eleventh Circuit reviewed this "evidence" in "the light most favorable to appellants" and correctly concluded that any direct or indirect supervision by Long & Scott was de minimis. Aimable, 20 F.3d at 441. In fact, the Eleventh Circuit concluded that these alleged examples of "infrequent oversight" were "notable because they indicate that Long & Scott, except on rare occasions, left supervision and oversight of appellants entirely to Miller and his crew." Id.

Contrary to Plaintiffs' assertion, the Eleventh Circuit did not hold "that indirect control and supervision are irrelevant in a joint employment context." (Petition, p. 16.) Rather, the Eleventh Circuit analyzed all of the record facts on these issues in the light most favorable to the Plaintiffs and simply found that both the "control" and "supervision" factors weighed against a joint employment finding. Likewise, the court did not, as Plaintiffs assert, "insist on direct control and continuous supervision." (Petition, p. 20.) Instead, it found that any direct or indirect control or supervision present in this case was de minimis. The Eleventh Circuit's factual findings on these issues raise no issue which warrants review by this Court.

III. THE ELEVENTH CIRCUIT GAVE DUE CONSIDERATION TO THE "ECONOMIC REALITY" IN THIS CASE AND DID NOT ADOPT A NEW TEST FOR DETERMINING JOINT EMPLOYMENT

Contrary to the main thesis of the Petition, the Eleventh Circuit did not adopt a "fundamentally different test [for determining employer status] in joint-employer versus single employer situations." (Petition, p. 12.) Instead, it expressly acknowledged and applied precisely the same test that the Plaintiffs advocate - i.e., "economic reality." (Compare Petition, p. 12 with Aimable, 20 F.3d at 439.)

The Eleventh Circuit thus applied the test that has been used by this Court and other courts, and that looks at the economic reality of all of the facts and circumstances. As the Eleventh Circuit stated:

> To determine whether an employer/employee relationship exists, for purposes of federal welfare legislation, we look not to the common law definitions of those terms (for instance, to tests measuring the amount of control an ostensible employer exercised over a putative employee), but rather to the "economic reality" of all the circumstances concerning whether the putative employee is economically dependent upon the alleged employer. See e.g., Rutherford Food Corp. v. McComb, 331 U.S. 722, 730, 67 S.Ct. 1473, 1477, 91 L.Ed. 1772 (1947) (construing distinction between employee and independent contractor status under FLSA); Patel v. Wargo, 803 F.2d 632, 635 (11th Cir. 1986) (analyzing joint employment under FLSA); Hodson v. Griffin & Brand of McAllen, Inc., 471 F.2d 325, 237-38 (5th Cir. 1973) (same).

Id. As noted above, the Eleventh Circuit applied the five (5) factors that are specifically set out in the AWPA regulations for determining whether a joint employment relationship exists.

Moreover, the Eleventh Circuit held that the proper analysis is not limited to these five (5) factors, and that the Court should consider the non-regulatory factors advanced by the Plaintiffs. As the Eleventh Circuit stated:

> The fact that the regulation makes reference to cases that considered factors in addition to the five regulatory factors reinforces our view that additional factors may be considered. Thus, we cannot accept Long & Scott's assertion that we should resolve the joint employment issue solely on the basis of the five regulatory factors.

Id. at p. 440.

Thus, Plaintiffs' argument that the Eleventh Circuit's decision deviates from the decisions of this Court and other courts of appeal is inaccurate. Its decision simply was more comprehensive in its consideration of all factors and in determining which factors in fact were applicable to the case at hand. Plaintiffs disagreement with the Eleventh Circuit's reasoned analysis of which factors were relevant and the relative weight to be accorded each factor based on the undisputed record in this case is no reason to grant their Petition.

A. This Court Should Reject Plaintiffs' Request That the Court Impermissibly Expand the AWPA and the FLSA so as to Make All Farmers Automatically a Joint Employer of the Workers Hired by an Independent Contractor

Plaintiffs' Petition in this case is nothing more than a request that this Court impermissibly expand the reach of the AWPA and the FLSA under the label of "economic reality" so as to automatically make all farmers a joint employer of the workers hired by an independent contractor. The district court below properly rejected Plaintiffs overreaching interpretation of the "economic reality" concept.

> The Plaintiffs also argue that the ultimate test regarding the existence of a joint employer relationship is one of "economic reality" and the degree of "dependency" of the workers upon the farmer. But the workers are always dependent on the

> farmer in an economic sense, and if the workers here were Long & Scott's employees, then it is fair to say that all farm laborers recruited by farm labor contractors would be employees of the farmers on whose farm they work. If Congress had intended that result in enacting the new statute [AWPA] in 1982, it could have said so; but it did not, opting instead to borrow the more limited reach of the joint employer jurisprudence under the FLSA.

Petition Appendix, p. 24a.

Plaintiffs' counsel here made this same argument in another case which was again rejected by a different district court.

> If the court were to accept plaintiffs' argument, however, every farmer who hired a farm labor contractor would become for the purposes of the AWPA and the FLSA a joint employer of the contractor's employees. An "economic reality" test that sweeps as broad as plaintiffs suggest is no test at all; it is a mere formality. The legislative history of the AWPA recognizes that there will be situations in which a farmer is not held to be a joint employer of a farm labor contractor's employees. See H.R. Rep. No. 97-885 at 7.

Charles v. Burton, 1994 U.S. Dist. LEXIS 10017, at 23 (M.D. Ga., July 1, 1994.) (Emphasis added.)

Indeed, the Plaintiffs have failed to cite, much deal with, the Department of Labor regulation that makes it clear that there is no rule that would premise joint employer status on the facts presented in this case. The regulations make it clear that, in situations such as presented here, a labor contractor may be found to be the only employer under the AWPA:

29 C.F.R. § 780.331 Crew leaders and labor contractors.

> (b) The situation is different where the farmer only establishes the general manner for the work to be done. Where this is the case, the labor contractor is the employer of the workers if he makes the day-to-day decisions regarding the work and has an opportunity for profit or loss through his supervision of the crew and its output. As the employer, he has the authority to hire and fire the workers and direct them while working in the fields. Complaints by the farmer about the quality or quantity of the work or about a worker are made to the contractor or his representatives who takes whatever action he deems appropriate. His opportunity for profit or loss comes from his control over the time and manner of performance of work by his crew and his authority to determine wage rates paid to his workers.

The Court should not accept Plaintiffs' invitation to impermissibly expand the AWPA and the FLSA; their Petition should be denied.

CONCLUSION

For the foregoing reasons, Long & Scott respectfully requests that the Court deny Plaintiffs' Petition for a Writ of Certiorari.

Respectfully submitted,

CHARLES KELSO
(Counsel of Record)
FISHER & PHILLIPS
1500 Resurgens Plaza
945 East Paces Ferry Road
Atlanta, Georgia 30326-1125
(404) 231-1400

Counsel for Respondent

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Supreme Court of the United States

OCTOBER TERM, 1994

VERGNAUD AIMABLE, *et al.*,
Petitioners,
v.
LONG & SCOTT FARMS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Courts of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

TIMOTHY B. DYK
(*Counsel of Record*)
DANIEL D. McMILLAN
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

GREGORY S. SCHELL
ROBERT A. WILLIAMS
FLORIDA RURAL LEGAL
SERVICES, INC.
406 S.E. Avenue E
Suite 102
Belle Glade, Florida 33430
(407) 996-5266
Counsel for Petitioners

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

Page

Cases

Bartels v. Birmingham, 332 U.S. 126 (1947) 4

Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317 (5th Cir. 1985) 5

Boire v. Greyhound Corp., 376 U.S. 473 (1964) 3, 6

Bonnette v. California Health & Welfare Agency, 704 F.2d 1465 (9th Cir. 1983) 4

Brock v. Superior Care, Inc., 840 F.2d 1054 (2d Cir. 1988) 4

Charles v. Burton, No. 92-150-VAL (WDO), 1994 U.S. Dist. LEXIS 10017 (M.D. Ga. July 1, 1994) 2

Castillo v. Givens, 704 F.2d 181 (5th Cir.), *cert. denied*, 464 U.S. 850 (1983) 5

Falk v. Brennan, 414 U.S. 190 (1973) 2, 3

Hodgson v. Griffin & Brand of McAllen, Inc., 471 F.2d 235 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973) 3, 5, 6

Howard v. Malcolm, 852 F.2d 101 (4th Cir. 1988) 3

Martin v. Selker Brothers, Inc., 949 F.2d 1286 (3d Cir. 1991) 5

Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748 (9th Cir. 1979) 3, 4, 5, 6

Ricketts v. Vann, No. 93-2447, 1994 U.S. App. LEXIS 20700 (4th Cir. Aug. 5, 1994) 4

Rutherford Food Corporation. v. McComb, 331 U.S. 722 (1947) 2, 3, 5

TABLE OF AUTHORITIES (Cont'd.)

Page

Tobin v. Anthony-Williams Mfg. Co., 196 F.2d 547 (8th Cir. 1952) 5

Usery v. Pilgrim Equipment Company, Inc., 527 F.2d 1308 (5th Cir.), *cert. denied*, 429 U.S. 826 (1976) 4

Wirtz v. Lonestar Steel Co., 405 F.2d 668 (5th Cir. 1968) 3

Statutes

Fair Labor Standards Act, 29 U.S.C. §§ 201-219 1

Migrant and Seasonal Agricultural Worker Protection Act § 1801-1872 1

Legislative History

H.R. Rep. No. 885, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 4547 . . . . 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-264

VERGNAUD AIMABLE, *et al.*,
Petitioners,
v.
LONG & SCOTT FARMS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

1. Respondent does not dispute that the issue of joint employment is an important and recurring question under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Workers Protection Act (AWPA), as shown in the petition (at 25-28) and the brief of Amici Curiae United Farm Workers of America, AFL-CIO, *et al.*, filed in support of the petition (hereinafter "Amici"). Nor does Respondent dispute that agricultural employers frequently seek to avoid obligations under the FLSA and the AWPA by employing crew leaders as the nominal employers of the farmworkers working in their fields. (*See* Pet. at 26; Amici at 9-13.) There is no significant dispute as to the underlying facts, and the decision of the Eleventh Circuit sets forth a clear and well-defined rule for joint employment (albeit a rule that conflicts with prior decisions of this Court and other circuits). This Court has not decided a significant joint

employment case under the FLSA for more than forty years (since its decision in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947)) and, so far as we are aware, has not decided any joint employment case for more then twenty years (since its decision in *Falk v. Brennan*, 414 U.S. 190 (1973)). The Court has yet to decide any case defining employment under the AWPA since its enactment in 1983. As shown in the amici curiae brief, this case presents issues of enormous significance to millions of American farmworkers.[1] (*See* Amici at 4-6.) Reversal of the Eleventh Circuit's decision would not "automatically make all farmers a joint employer" (Opp. at 25), but would require that the lower federal courts use the proper standard rather than the restrictive standard adopted by the court below.

2. Respondent primarily opposes certiorari on the ground that, in its view, the Eleventh Circuit decision is correct and on the mistaken theory that there is no conflict between the decision below and decisions of this Court or other Courts of Appeals. As shown in the petition, the decision below is not sustainable because it conflicts with decisions of this Court and with clear language and legislative history approving the decisions on which petitioners rely. More significantly for present purposes, there is a direct conflict between the legal standards adopted in *Aimable* and those applied by this Court and other Courts of Appeal.

3. As shown in the petition, the *Aimable* decision conflicts with prior decisions of this Court and other circuits holding that a single unified test of employment applies in single and joint employer cases. (Pet. at 12-16.) Those conflicting decisions apply the same analysis whether the workers claim that they are employees, rather than independent contractors, or whether they

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[1] The importance of granting this Petition is underscored by the fact that district courts are already relying upon *Aimable* to disregard otherwise relevant factors supporting a finding of joint employment and dismissing the claims of migrant farmworkers. *See, e.g.*, *Charles v. Burton*, No. 92-150-VAL(WDO), 1994 U.S. Dist. LEXIS 10017 (M.D. Ga. July 1, 1994).

assert that they are jointly employed. The Eleventh Circuit has created a fundamentally different test for analyzing joint employment and in that respect, its approach conflicts with this Court's decision in *Rutherford* (which respondent wholly ignores)[2] and the other cases cited in the petition (at 12-16) which expressly hold that the same test applies. For example, in *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237-38 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973), the Fifth Circuit relied upon *Wirtz v. Lonestar Steel Co.*, 405 F.2d 668, 669 (5th Cir. 1968), which held that the same test and factors that apply in a single employer case apply in a joint employer case. This point is either lost on respondent or it has simply chosen to ignore it. In all events, the resulting conflict merits resolution by this Court.

4. Respondent admits that in adopting a different test for joint employment the Eleventh Circuit has dismissed as legally irrelevant four factors that frequently support a finding of joint employment -- namely, investment in equipment and facilities, opportunity for profit and loss, permanency and exclusivity of employment, and the degree of skill required to perform the job. (Opp. at 4.) Indeed, the Eleventh Circuit, in its own words, held that these four factors "are of no value to joint employment determinations." (App. 18a.)

As discussed in the petition (at 22-23), numerous cases dealing with joint employment relationships have held that the four factors rejected by the Eleventh Circuit are relevant to the joint employment determination. *See, e.g.*, *Rutherford*; *Howard v. Malcom*, 852 F.2d 101, 104-05 (4th Cir. 1988); *Real v. Driscoll*

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[2] Nowhere in either of two other decisions of this Court discussing joint employment is there any suggestion that different tests apply depending upon whether the case is a joint employer or single employer case. *See Falk*, 414 U.S. at 195; *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

Strawberry Assocs., Inc., 603 F.2d 748, 756 (9th Cir. 1979).[3] Since the filing of the petition, the Fourth Circuit has, again, expressly adopted an approach applying the very factors deemed legally irrelevant in *Aimable*, thus reaffirming the existence of a conflict. *Ricketts v. Vann*, No. 93-2447, 1994 U.S. App. LEXIS 20700 at *6 (4th Cir. Aug. 5, 1994). Similarly, since factors to be considered in single employer cases are the same as those considered in joint employer cases, *Aimable* further conflicts with single employer cases decided by this Court and virtually *every* circuit court of appeals which apply the four factors deemed legally irrelevant by *Aimable*. *See, e.g.*, *Bartels v. Birmingham*, 532 U.S. 126, 130 (1947) (applying each of the four factors rejected by *Aimable*); *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311-15 (5th Cir.) (same), *cert. denied*, 429 U.S. 826 (1976); *Brock v. Superior Care*, 840 F.2d 1054, 1058-59 (2d Cir.

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[3] Respondent vainly attempts to explain away the conflict between the *Aimable* decision and *Real* 603 F.2d at 756, a case in which the Ninth Circuit, as part of its joint employer analysis, applied each of the four factors rejected by the *Aimable* court. First, respondent (at 9) notes that "[n]o crew leader was involved" in *Real*. Of course, it is of no legal significance that *Real* concerned whether a grower and a distributor of strawberry plants – rather than a grower and a crew leader – were joint employers. Second, respondent quotes from the *Real* decision to suggest that it held that the four factors are only useful to distinguish employers from independent contractors (Opp. at 9) when, later in the opinion, the Ninth Circuit also applied those factors for purposes of its joint employment analysis. *Real*, 603 F.2d at 756. Third, respondent misconstrues two other Ninth Circuit cases as rejecting the four factors. (Opp. at 4, 5-6, 9.) In both cases the court, while finding no joint employment, recognized the relevance of multiple factors. Indeed, in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983), the Ninth Circuit indicated that the factors enumerated by the court were simply among the relevant factors, emphasized that the totality of the circumstances must be considered, and cited *Real* thereby confirming the relevance to joint employment analysis of each of the four factors rejected in *Aimable*.

1988) (same); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1293-96 (3d Cir. 1991) (same).

Respondent's opposition (at 5-6) implicitly suggests that *Rutherford* and the other conflicting decisions discussed in the petition (at 21-23) have somehow been repealed by the AWPA regulations which specifically list only five factors relied on by the Eleventh Circuit. But, as shown in the petition (at 15-16, 22), those regulations recognize that other factors are relevant and the legislative history of the AWPA specifically approves the conflicting decisions upon which petitioners rely. H.R. Rep. No. 885 at 7, 97th Cong., 2d Sess., *reprinted printed in* 1982 U.S.C.C.A.N. 4547, 4553.

5. The petition (at 24-25) explains how *Aimable* conflicts with prior decisions of this Court and other circuits by assigning "little relative weight" to two other factors -- ownership of the property or facilities where the work occurred and performance of a specialty job integral to the business -- factors indisputably supporting a finding of joint employment. *See, e.g., Rutherford Food Corp.*, 331 U.S. at 730; *Griffin & Brand of McAllen, Inc.*, 471 F.2d at 237-38; *Real* 603 F.2d at 755. Respondent simply ignores this conflict.

6. Finally, respondent fails to refute the existence of a conflict between (1) *Aimable* and its insistence on "direct" control and supervision, and (2) decisions of this Court and other courts of appeal that require only "indirect" control and supervision.

As explained in the petition (at 16-20), the *Aimable* court improperly focuses on "direct" control and "continuous" supervision. The cases cited in the petition demonstrate that such an approach conflicts with the approach of this Court (Pet. at 18) and other circuits. *See, e.g., Castillo v. Givens*, 704 F.2d 181, 189 (5th Cir.), *cert. denied*, 464 U.S. 850 (1983); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1328 (5th Cir. 1985); *Tobin v. Anthony-Williams Mfg. Co.*, 196 F.2d 547, 549-

50 (8th Cir. 1952); *Real*, 603 F.2d at 756.[4] Respondent (Opp. at 15-23) attempts to justify *Aimable*'s requirement of "direct" and "continuous" supervision by arguing that Respondent's direct supervision was as a factual matter "de minimis." But, even if that were true (which it is not),[5] that is simply beside the point; indirect control and supervision are enough, particularly where unskilled piece work is involved. (Pet. at 20.)[6] Thus, the approach of the *Aimable* court conflicts with the approach of other courts of appeals.

7. Resolution of the conflict on these important issues is critical to proper enforcement of the FLSA and the AWPA in the context of American agriculture. The decision below presents the best vehicle for resolution of this pervasive conflict. Certiorari should be granted.

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[4] Although Long & Scott exert much effort to distinguish factually *Castillo* and *Beliz* (Opp. at 10), Long & Scott misses the point -- these cases hold that certain critical facts are legally relevant to the control and supervision factors and, therefore, conflict with *Aimable* which dismisses such facts as legally irrelevant.

[5] While Long & Scott admits that Frank Scott supervised the grading work of the farmworkers, it asserts that Scott did not express concerns about "particular individuals" (Opp. at 19); however, Long & Scott overlooks Miller's Affidavit in which he admits the "Mr. Scott or a farm manager may tell me or my supervisor that a *particular worker* is not doing a good job." (RSF2: Miller Aff. ¶ 31 (emphasis added).)

[6] Long & Scott also ascribes much significance to Miller's putative status as an independent contractor while disregarding the authorities cited in the petition (at 28) which uniformly hold that this status does not insulate a grower from liability as a joint employer. *See, e.g.*, *Boire*, 376 U.S. at 481; *Real*, 603 F.2d at 755-56; *Griffin & Brand of McAllen, Inc.*, 471 F.2d at 235; H.R. Rep. No. 885 at 7, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 4553.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY B. DYK
(Counsel of Record)
DANIEL D. McMILLAN
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

GREGORY S. SCHELL
ROBERT A. WILLIAMS
FLORIDA RURAL LEGAL
SERVICES, INC.
406 S.E. Avenue E
Suite 102
Belle Glade, Florida 33430
(407) 996-5266

Counsel for Petitioners

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